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143 - 27624

Opinion filed May 9, 1923.

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ROY T. KLINE, Appellee, v. GEORGE ENOS THROOP, Incorporated, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

23 I.A. 641 1st Dist

23 Ill. 643

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment in the sum of $951.24, recovered by the plaintiff in the Municipal Court of Chicago.

The defendant corporation is engaged in the business of soliciting bill-poster advertising. The business done is acquired through orders obtained from advertisers by solicitors. The plaintiff, Kline, is referred to in the testimony, as the defendant's star solicitor. Under the method used in this business, the advertiser paid the defendant for the advertising ordered and executed, and the defendant, in turn, paid the bill poster who actually did the work, after deducting a commission of sixteen and two-thirds per cent. It will thus be seen that the entire income derived by the defendant from its business, was this sixteen and two-thirds per cent on the amount of business done.

Up to February 1918, the defendant's solicitors, including the plaintiff, were paid an amount equal to seven and one-half per cent of the business brought into the company by them. It had been the custom up to that time, to reserve another

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Appellee,

v.

GEORGE HOUGH THROOP,
Incorporated,

Appellant.

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OF CHICAGO.

23 I.A. 643

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment in the sum of $983.34, recovered by the plaintiff in the municipal court of Chicago.

The defendant corporation is engaged in the business of soliciting bill-poster advertising. The business done is acquired through orders obtained from advertisers by solicitors. The plaintiff, Kline, is referred to in the testimony, as the defendant's star solicitor. Under the method used in this business, the advertiser paid the defendant for the advertising ordered and executed, and the defendant, in turn, paid the bill poster who actually did the work, after deducting a commission of sixteen and two-thirds per cent. It will thus be seen that the entire income derived by the defendant from its business, was this sixteen and two-thirds per cent on the amount of business done.

Up to February 1918, the defendant's solicitors, including the plaintiff, were paid an amount equal to seven and one-half per cent of the business brought into the company by them. It had been the custom up to that time, to reserve monthly

seven and one-half percent for overhead charges and dividends, and the remaining one and two-thirds per cent of the total of sixteen and two-thirds per cent, which represented the defendant's income, had been paid over to the Bill Posters' Association.

It appears from the record that the plaintiff had been somewhat dissatisfied with his situation in the defendant's organization; that a business rival of the defendant had made the plaintiff attractive offers, and he made it known that unless he received some further inducement from the defendant, he would not continue with it. This led to a number of conferences between the plaintiff and representatives of thedefendant, with the result that a meeting of the defendant's Board of Directors was held early in February, 1918, at which, what was called a new fiscal arrangement of the defendant company was established by a formal, written resolution, adopted by the Board. This resolution contained a number of provisions which are not involved in the issues presented by this record, and they may, therefore, not be noted. So far as it affects this case, the resolution provided that the seven and one-half percent, which, up to that time, had gone directly to the solicitor who had brought in the business,was to be paid to him as theretofore. It provided further, that the seven and one-half per cent, which had previously been reserved for general overhead expenses, and the one and two thirds per cent, which, up to that time had been paid to the Bill Posters' Association, should be considered as gross earnings, the latter one and two thirds percent to be kept in a separate fund. It then provided that the net earnings of the company should consist of the difference between the gross earnings, above referred to, and certain charges which were set out in detail. The entire

seven and one-half percent for overhead charges and dividends, and the remaining one and one-third per cent of the total of sixteen and two-thirds per cent, which represented the defendant's income, had been paid over to the Bill Posters' Association.

It appears from the record that the plaintiff had been somewhat dissatisfied with his situation in the defendant's organization; that a business rival of the defendant had made the plaintiff attractive offers, and he made it known that unless he received some further increment from the defendant, he would not continue with it. This led to a number of conferences between the plaintiff and representatives of the defendant, with the result that a meeting of the defendant's Board of Directors was held early in February, 1919, at which, what was called a new fiscal arrangement of the defendant company was authorized by a formal, written resolution, adopted by the Board. This resolution contained a number of provisions which are not involved in the issues presented by this record, and they may, therefore, not be noted. So far as it affects this case, the resolution provided that the seven and one-half percent, which, up to that time, had gone directly to the initiator who had brought in the business, was to be paid to him as theretofore. It provided further, that the seven and one-half per cent, which had previously been reserved for general overhead expenses, and the one and two thirds per cent, which, up to that time had been paid to the Bill Posters' association, should be considered as gross earnings, the latter one and two thirds percent to be kept in a separate fund. It then provided that the net earnings of the company should consist of the difference between the gross earnings, where referred to, and certain charges which were set out in detail. The resolution

the

gross earnings were to be subject to these fixed charges, but it appears that, these charges never were such as to necessitate drawing on the special fund, made up of the one and two thirds per cent.

The resolution provided that this reserve fund of one and two-thirds per cent should be pro rated annually between "those persons entitled thereto, in the manner hereinafter defined." Thereafter, the resolution provided that the net earnings of the company (the seven and one-half per cent, reserved for expenses, plus the one and two-thirds per cent above referred to, less expenses and overhead charges) should be "divided proportionately among the several parties entitled thereto, on the basis of the actual amount of cash business 'turned in' to the company."

After the adoption of this resolution by the Board of Directors of the defendant, the plaintiff continued to act as one of its solicitors for five or six months, when he severed his connection with it. A part of the plaintiff's claim, to recover which he instituted this suit against the defendant, is for one and two-thirds per cent on the business brought into the company by him, from the time the resolution above referred to went into effect to the time he left the defendant. That claim is resisted by the defendant on the theory that it was the understanding that none of the defendant's solicitors were to participate in the distribution of this one and two-thirds per cent, unless they remained with the defendant and continued in its employ for one year after the date of the adoption of the resolution. It is the plaintiff's position that there was no such conditional arrangement, but that the fiscal policy outlined in the resolution was adopted as an inducement to solicitors to

remain with the defendant, and that it was the understanding that the arrangement was to continue for two years.

It also appears that the defendant maintained what was referred to in the record as an art department, where certain sketches and designs were executed, in connection with the advertising matter that was involved in orders which solicitors were trying to acquire or which had been acquired. There was some criticism of this department, on the part of the plaintiff, and he had apparently suggested that it be abolished. The defendant was unwilling to do away with this department, but its president finally suggested to the plaintiff that he have such sketches and designs as he might have occasion to need, done on the outside, with the understanding that he was to pay the cost of that work, and, as compensation for that expense, the plaintiff was to be allowed, and receive, an amount equal to that proportion of the total cost of maintaining the art department which the business brought in by the plaintiff bore to the total business done by the company. This portion of the plaintiff's claim amounted to $200.00. It is not denied that the latter amount bore the same proportion to the total cost of maintaining the art department, during the months plaintiff was connected with the defendant company, after the adoption of the resolution above referred to and up to the time he left the company, as the business brought in by him, during that period, bore toward the total business done by the defendant. But, the defendant contends that the plaintiff is not entitled to this amount, because the resolution above referred to and the plaintiff's implied agreement to continue his services with the defendant company, under the provisions of that resolution, resulted in an agreement on his part to remain with the company

remain with the defendant, and that it was the understanding that the arrangement was to continue for two years.

It also appears that the defendant maintained what was referred to in the record as an arc department, where certain displays and designs were executed, in connection with the advertising matter that was involved in orders which solicitors were trying to acquire or which had been acquired. There was some criticism of this department, on the part of the plaintiff, and it had strongly suggested that it be abolished. The defendant was unwilling to do away with this department, but the president finally suggested to the plaintiff that he have such sketches and designs as he might have occasion to need, done in the outside, with the understanding that he was to pay the cost of that work, and, as compensation for that extra service, the plaintiff was to be allowed, and received, an amount equal to that proportion of the total cost of maintaining the arc department which the business brought in by the plaintiff bore to the total business done by the company. This portion of the plaintiff's claim succeeded in ELECTION. It is not denied that the latter amount bore the same proportion to the total cost of maintaining the arc department, during the months plaintiff was connected with the defendant company, after the adoption of the resolution above referred to and up to the time he left the company, as the business brought in by him, during that period, bore toward the total business done by the defendant. But, the defendant contends that the plaintiff is not entitled to this amount, because the resolution above referred to was not the result of mutual agreement, but was imposed on him against his will. Assuming that the plaintiff's contention is well founded, after the effective of that resolution, the matter is of agreement on the part of both parties with the company

for a year, which he had failed to do.

The plaintiff's claim is based on the resolution passed by the defendant's Board of Directors. Any conversations or conferences the parties may have had leading up to the adoption of this resolution, were merged in it. In our opinion, that resolution is quite capable of clear interpretation from the terms contained in it, and it matters not in what sense any of the parties understood it. 14 C.J. 377. As the author there says, "neither the private views nor the public declarations of individual members of the corporation can be inquired into for the purpose of ascertaining the meaning."

An examination of the resolution discloses the use of the term "person entitled thereto", or "solicitor entitled thereto," three times.

The income of the defendant was represented by a charge of sixteen and two-thirds per cent on all contracts made. Of this, seven and one-half per cent had always gone to the solicitor who secured the business. By this resolution a financial plan was put into effect, whereby the remainder or the one and two-thirds per cent which had, prior to the adoption of the resolution, gone to the Bill Posters' Association, plus the remaining seven and one-half per cent, which was reserved for overhead expenses, was designated as gross profits. That part of the resolution describing these gross profits, provided that the one and two-thirds per cent which had theretofore been paid to the Bill Poster's Association, should thereafter be kept in a separate fund and should be "prorated annually between those persons entitled thereto in the manner hereinafter defined." The resolution then provided that the net earnings of the com-

in a party, which he has failed to do.

The Plaintiff's claim is based on the remuneration paid by the defendant's board of directors. Any nonrecognition requirements the parties may have had leading up to the adoption of this resolution, were lodged in the shareholders' meeting. Such resolution is quite plainly at least interpretation from the bylaw mentioned in §9, and it matters not in what sense any of the parties understood it. 11 C.J. 577. "As the matter stands now, "neither the parties alone nor the minutes constituting of individual members of the corporation can be introduced into the process of ascertaining the resolution."

An examination of the remuneration directors has been of the form "person entitled thereto", or "entitled entitled thereto," there then.

The issues of the litigation are represented by a number of minor pre-trials per cent as all evidence work. Mr. Smith, Jones and Marshall per cent had always come to the initiative for the business. By this speculation a financial plan was put into effect, namely the management or the one and the-third per cent which has, prior to the adoption of the resolution, gone to the Mill Project' Foundation, then the remaining seven and one-half per cent, which was reserved for overhead expenses, was contributed to other parties. Not each of the beneficiaries assembling their own profits, portions that the one and two-third per cent which had therefore been paid to the Mill Project's Foundation, should moreover be kept in a separate fund and should be 'preserve exactly because those persons entitled thereto in the regular proportion.'

The resolution then provided that the net earnings of the corporation

pany should consist of the difference between the gross earnings (the seven and one-half per cent reserved for overhead expenses, and the one and two-thirds per cent above referred to) and certain specified fixed charges. It then provided that these net earnings should "be divided proportionately among the several parties entitled thereto, on the basis of the actual amount of cash business 'turned in' to the company," and it further provided in this connection, that an accounting should be made quarterly.

In the following paragraph of the resolution it was provided that the seven and one-half per cent, going direct to the solicitor who got the business, and which thus did not enter into either the gross or the net profits, as defined by the resolution, should be paid "directly to the solicitor entitled thereto, and shall not be computed in determining the gross earnings as hereinbefore defined."

In our opinion, it is clear from the terms of the resolution itself, that the "person" or "solicitor entitled thereto" as used in the resolution, refers to the person or solicitor producing the business, and further, that the division of this one and two-thirds per cent was to be among those persons or solicitors in proportion to the amount of business produced by them.

It was the defendant's contention that what was intended and meant by this resolution, was that this one and two-thirds per cent should go to those solicitors who remained with the defendant throughout a period of one year, from and after the time the resolution was adopted and that the solicitors' remaining with the defendant was a condition with which they

party should consider of the difference between the Labor authority like terms and merely not just reserved for a minimum expense, and the one and two-thirds per cent above referred to) and some other technical first chapter. It then directly that there not mentioning simply "the dividend payment" mainly among the reserve particle quoting directly, on the basis of the annual account of each business 'issued but to the company,' and if further consideration in this connection, that an accounting should be made separately.

In the following consideration of the association, it was pointed out the same the "benefit per year, plus direct to the solicitor for the business, and which has the net value this either the gross or the net profits, as defined in the legislation, should be paid "directly to the solicitor solicitor involved, and shall not be considered in determining the gross earnings as determinative defined."

In our opinion, it is also from the terms of the transaction itself, that the "person" or "solicitor-solicitor relationship" as used in the resolution, refers to the person or solicitor responsible the weighed, and further, not the division of fees the and two-thirds per cent was to be among three persons or solicitors here in principle to the amount of reserve payment of gross.

In the [illegible]'s statement that that the [illegible] one [illegible] of this resolution, and that [illegible] solicitor one must should do it those solicitors who [illegible] the solicitor [illegible] a period of one year, then and after the time the resolution was adopted and that [illegible] [illegible] the solicitor [illegible] was a specific [illegible] to-

must comply in order to participate in the division of the one and two-thirds per cent in question. As it appears in the record, this resolution makes no reference whatever to any period of time, beyond the provision that the fund in question shall be prorated "annually" between "those persons entitled thereto in the manner hereinafter defined." The manner thereinafter defined is to the effect that the division shall be made "proportionately among the several parties entitled thereto, on the basis of the actual amount of cash business 'turned in' to the company." This does not imply in any way that it was a condition prededent that a solicitor must have continued his connection with the company a full year after the adoption of the resolution, before he would be entitled to his proportionate part of this one and two-thirds percent, based on the amount of business he had turned in to the company. The one and two-thirds per cent was liable to be drawn on to meet the overhead expenses and therefore there might not be any actual distribution until the end of each year, when it could be determined whether it had become necessary to reduce this special fund in that way. But the year having expired and it having been determined that no such reduction had become necessary, the plaintiff, under the terms of the resolution, became entitled to his proportionate part of the fund based on the amount of business he has turned in to the company during that year. No further conditions being attached to this right, in the resolution, none may be read into it nor may such conditions be supplied by parol.

The defendant offered considerable evidence in explanation of the meaning of the resolution, and much of it was admitted, and plaintiff's objection to some of it was sustained. In our opinion none of it was competent. But when we examine

such of it as was admitted, we find much to support the evident meaning of the resolution. It is apparent that the plaintiff was threatening to leave the defendant company. It was greatly to defendant's interest that he remain. To induce him to do so, and in an effort to make it worth his while to continue his connection with the defendant, a new fiscal arrangement was established by the defendant, whereby the plaintiff, as well as the defendant's other solicitors, was to receive not only the seven and one-half per cent on all business brought in, but was also to participate in an annual proportionate distribution of the one and two-thirds per cent in question, or so much of it as might remain if the overhead expenses consumed the seven and one-half percent reserved for that purpose, and it became necessary to use any of the one and two-thirds per cent fund to meet those expenses. That the latter contingency did not arise, is admitted. The record shows that the defendant's president proposed this fiscal arrangement for a period of a year; that plaintiff insisted that it should be carried on for three years, and that the parties made a compromise to the effect that it should be the policy of the company for a period of two years. But that no solicitor should be permitted to participate in the proportionate distribution of this fund, unless he continued his connection with the company until the end of the year, is contrary to the clearly expressed terms of the resolution itself, and any such interpretation may therefore not prevail.

As to the plaintiff's claim for $200.00 for work he had had done outside, which properly should have been done by the defendant's art department, we are of the opinion he was also entitled to that. A letter from defendant's president to the

plaintiff, admits such to be the fact, "in case we carried through the resolution." In another letter between the same parties, it is stated that the amount due to plaintiff on account of his work done on the outside, was to be computed "at the end of the year." There was no suggestion that this allowance was conditioned on plaintiff's remaining with the defendant throughout any stated period of time. Plaintiff could not be deprived of this proportionate share of the one and two-thirds per cent of his proportionate part of the expense of the art department, not incurred because of his having his art work done on the outside, even if he left the defendant company within the first year after the new arrangement was provided for. Ely v. Ling, Richardson & Co., 265 Ill. 148.

In our opinion, the action of the trial court in allowing the plaintiff's motion for a peremptory instruction was clearly a matter of the interpretation of the writings in evidence and was supported by a proper consideration of them.

The judgment of the Municipal Court is therefore affirmed.

JUDGMENT AFFIRMED.

O'CONNOR, J. CONCURS,
TAYLOR, J. DISSENTS.

identity. Audio must be the text, the line on which
through the revelation." In another letter between two
writers, it is stated that the author has to identify on one
side of the page on the writer, but to be separate for the
end of the text." Later one is suggesting that this difference was
constituted in Glendalff's remarkable film interview
for the United States of Alma. Virginia Woolf could be exercised
in this psychoanalytic sense of the one and immediate and most
of the psychoanalytic part of the sequence of the bit dependent,
and Lawrence because of the having the art-work free to the
play, some of the lift the television because which the first
year after the screenwriter and artistic rev. <u>Cf. a. Jones</u>
<u>Dramatics a. Co.</u>, pp. 111. 324.

In our minutes, the action of the first scene is
following the plaintiff's motion for a preliminary injunction was
already in hand at the commencement of the activities the play
there not was concerned by a street demonstration of that.

The primary of the character basis is intuitive
affirmed.

Director's Critique.

Director: J. Jones.
Talent: J. Jones.

(3167 A)

157 - 27633.

Opinion filed May 9, 1923.

BERTHOLD and HELENA JOHN, Appellees, v. CHRIST W. DAHNKE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

230 I.A. 643

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiffs, Berthold John and his wife, were the owners of two buildings, which had been heated with coal. Desiring to use oil fuel for heating purposes, they made a contract with the defendant, Dahnke, by which he undertook to construct tanks in the basements of the two buildings, for the purpose of storing the fuel oil. These tanks were built and partially filled with oil, when the plaintiffs claim that the oil began to leak out of them. The plaintiffs had paid $422.50 on account of the compensation the defendant was to receive for building the tanks. The defendant claimed that there was a balance of $672.50 due him on the contract. Thereupon, Dahnke sued them to recover the balance he claimed was due, and in that case the trial court entered judgment for the defendants at the close of the plaintiff's case. To reverse that judgment the defendant, Dahnke, perfected an appeal to this court, which is case No. 27634, in which we are this day filing an opinion. About two months after Dahnke started his suit against the defendants, they instituted a separate suit against him, in which they claimed that the tanks which Dahnke had constructed for them under the contract, were defective and that as a result of the defective construction of the tanks they had been damaged to

the extent of $5,000.00. In this action, the plaintiffs, Mr. and Mrs. John, recovered a judgment against Dahnke in the sum of $1871.80, to reverse which, the defendant has perfected this appeal. The record shows that the two cases were tried together in the trial court and the court entered separate judgments in each case, and, as above stated, separate appeals have been perfected from these two judgments. The record in the case in which Dahnke was the plaintiff shows that the parties agreed that the cases were to be consolidated and tried together in the trial court. The record in the case at bar, in which Mr. and Mrs. John were the plaintiffs, contains a stipulation to the effect that the entire evidence heard by the trial court in connection with the trial of these two cases was to be considered as the evidence in each of the cases. Apparently the cases were consolidated for hearing in the trial court and were tried as separate cases, the court entering a judgment in each case, but under the stipulation referred to, the evidence heard by the court in the trial of both cases, was to be considered as the evidence in each case. A jury was waived in the trial of these cases and the evidence was submitted to the court.

Apparently, Dahnke put in the evidence to support his case first. He testified that he was a cement contractor; that he had constructed tanks to hold fluids, and entered into the contract with Mr. and Mrs. John to construct the tanks in question; that the tanks were constructed according to the contract; that he examined them after they were finished and that they were properly constructed; that after oil had been placed in the tanks, John claimed they were leaking, but that upon examining them the witness saw no sign of a leak. On cross-

the amount of $8,000,000. In this action, the plaintiffs, Mr. and Mrs. John, claimed a property damage judgment against in the sum of $1270.00, in various ways, the defendant has contested this amount. The events which led to the suit were also based upon in the trial which had not only actual damages but punitive damages in such case, and, if proven guilty, defendants would have been imprisoned from their judgments. The Prosecutor in his case by which proofs was the plaintiff's money that the getting against that the more was to be prosecutors and taken judgment in the total amount. The result is the trial as but, in which Mr. and Mrs. John was the plaintiff, obtained a satisfaction of the offers that the making evidence against by the total money is commencing when the being to those we which the to be commenced to the defendants in the amount of the money. Ultimately the money was recognized by jumping on the total judge and were lifted at adjacent issue. Mr. Joyce mainlain - Judgment in much case, but about the malpractice involved. The evidence owned by the money in the right of their money, was to be mentioned to the attorney in such case. A jury was solved in the light of those documents the evidence was mentioned to the money.

Apparently, because you in the evidence to attorney for more first. The beginning that to the a money monetary; that be but compensation money to land filing, but mentioned that the employed with the and the. That is monitoring the Smith is question that the money were counterclaim amount of to the case. Lastly that to attorney also after they were judgment and that they were principally monetary; and other all has been limited in the lawsuit, the claims that were judgment. The last case involving that the attorney was on sign of a lawsuit. In attorney-

examination, he testified that the tanks in question were the first he had built for the purpose of holding oil; that in constructing these tanks they first set up their forms, and poured in the concrete forming the walls of the tanks, and that after the walls had set they tamped down the sand at the bottom of the tanks and then put in the tank floors, these also being of concrete, and then tied the floors and the walls together with clear cement. Apparently the tanks were constructed in the basement of the buildings referred to, the basement floor being broken up and removed from the place where the tanks were to stand, and the soil removed so that the bottoms of the tanks, as finished, would be about a foot below the basement floor. One of the tanks was constructed to hold 8,000 gallons of oil, and the others to hold 6,000 gallons of oil. Dahnke further testified on cross-examination that he gave no consideration to the weight of the oil, which was to be borne by the floors, but only to the capacity of the tanks; that he could not tell how much weight the union of the floors with the walls would bear before it would break; that in constructing one of the tanks, he used the wall of the building as one of the tank walls. On re-direct examination Dahnke testified that John claimed one of the tanks was leaking shortly after they were constructed, claiming that the oil was disappearing through the bottom of the tank, but that John could not show him any leak. He further testified that the weight of the oil to be put in the tanks had no bearing on the solidity of the tanks; that the tamping of the soil made a good foundation for the tank floors; that he did not know how much weight it would stand but it was strong enough to hold up anything.

meanwhile, he noticed that his boots in leaving was, the flint in the main cut the chance of leaving off, that by accidentally there could flint was an hour flame, and proved in the country finding his wells of the land, and that after the main had the flint burning down the stone in the bottom of the tanks was also in the land flints, those also being of economy, and then also the flints and the main became also flint tanks. Accordingly the main was reserved in the basement of the building situated in, the basement flint being behind in the removed from the place where the tanks were to stand, and the oil stored in the bottom of the tanks, or flints, would be much a foot below the basement floor. One of the tanks was constructed to hold 2,000 gallons of oil, and the others to hold 3,000 gallons of oil. Because further difficulties or inconvenience that had to grow no misunderstanding to the welfare of the oil, which was to be borne by the flints, but only to the capacity of the tanks; that he might not lose such work which the of the flints did not make such loss. It was hardly that in overcrowding the of the tanks, he must the oil of the building on one of his tank main. The basement mechanism tanks facilities that also stained one of the tanks was leaking nearly after they were constructed, showing that the oil was disappearing through the bottom of the tank, but that flint could not come out of the tank. He therefore decided that the water of the oil to be put in the tanks and to depend on the stability of the tanks; that the weight of the oil with a good foundation for the tank flints; that is the oil tanks but much weight it would stand and it was strong enough to hold up anything.

One Miller, who was a teamster for Dahnke, also testified as to the manner in which the tanks were constructed - he says the floors were tied to the walls by plaster. He also testified, on cross-examination, to the fact that some time after the tanks were finished Dahnke sent him with one or two others, over to the premises where the tanks were located, to pump out the oil; that after the oil was out they were to look for a leak but they could not see any; that they pumped out about five barrels of oil; that on one occasion, when they were engaged in this latter work, Mrs. John said they were not going to use oil because it smelled bad and it made too much noise and dirt; that it "makes so much dirt customers can't sleep."

One Perusits, a laborer for Dahnke, testified to the manner in which the tanks were constructed; that after the tanks were finished he looked them over inside and outside and found they were all right and done in a workmanlike manner; that he was one of those who were sent to take the oil out of the tanks later; that on one occasion when they went to the premises for that purpose, the basement was locked and they could not get in; that he spoke to Mrs. John and that she said that she was not going to let anybody in "because she didn't want it fixed * * * She said the whole house stunk from the oil, and it made too much noise and she would lose all her customers. Said she didn't want to burn oil, she burn coal"; that Mrs. John would not let him in; that he saw no signs of leaking around the tanks.

One, Oswald, testified to the effect that Dahnke had built a tank in his premises, for fuel oil; that he used the

tank about two months and then took it out; that the tank held the oil but it leaked through the pipes. This tank was apparently built after Dahnke had built the tanks for the Johns. Upon being recalled to the stand, Dahnke testified that he understood that the tanks he was to build for Mr. and Mrs. John were to be for the purpose of holding fuel oil.

In support of their claim that the tanks were defective and had occasioned the damage they sought to recover, the following evidence was submitted by Mr. and Mrs. John. One Becker testified that he was in the employ of an oil company which had sold and delivered to John, 11,000 gallons of oil during the months of October and November, 1920, which was of the reasonable value of 12 cents a gallon; that the oil company had salvaged 2520 gallons of oil out of the tanks, at a cost of 5 cents a gallon; that when they were called to salvage the oil, if possible, they made some tests, by means of a stick, to determine whether the oil was leaking out and whether it would be advisable to remove it; that from one day to the next they found that the top of the oil in the tank tested had dropped an inch; that in one of the tanks there was enough oil to be pumped out but that in the others there was notenough oil left in the tanks to pump, as they contained only about 4 inches and the hose they used was from 2½ to 3 inches in diameter; that the difference between the amount of the oil delivered to John and the amount salvaged from the tanks, was 9560 gallons.

John testified that he had paid Dahnke $422.50, on account of the amount of the contract price for constructing the tanks; that after the oil had been put inthe tanks he had found them leaking in both the buildings; that he saw oil coming out on the floor; that he measured the oil in the tanks with a

rule, to see whether the oil was coming out of the tanks, and found a shrinkage of one inch over night; that he did not use any of the oil for heating his buildings, but used about 50 gallons for a hot water heater; that some months later he had the tanks taken out, by a man named Williamson, paying him $375.00 for the work; that they took samples of the concrete from each of the tanks; that upon the removal of the tanks, the ground was "all soaked full of oil." On cross-examination, he testified that he measured the oil with a rule, in one of the tanks after the oil was put in; that there was a 2 inch loss in 24 hours; that he examined another of the tanks in his other building, three or four days later, by looking through a man-hole in the top of the tank; that he saw half of the oil was gone; that he then took measurements onthat tank and saw it also was losing 8 inches in a day. He further testified that he did not let the oil company put oil in the tanks after he found they were leaking; that they called up the oil people and told them not to deliver any more oil; that they brought one more load of oil and he sent it back; that they did not stop the oil deliveries because the noise or smell was objected to by their tenants, but that the only reason for discontinuing the oil, was the leaking of the tanks; that no tenant objected to the use of oil or the smell or noise; that he asked Dahnke to come to the premises and examine the tanks; that he showed him where they were leaking; that the oil came up over the basement floor; that the oil company pumped out and took back 2550 gallons; that Dahnke's men were there to pump out some of the oil but they never appeared to locate where the leak was; that he never asked them to. He further testified that he did not want patch-

ed up tanks, and that there was no room in the basements to put other tanks in before the old ones were removed; that he had to go back to heating with coal and abandon the plan of using oil because he had no oil. He was asked whether he could not get more oil and he answered, "Do you think I would buy more oil when the rest run out?"

One Salathe, a chemist, testified that he did not know either Mr. or Mrs. John; that he had had occasion to consider the question of building cement tanks as oil reservoirs; that in his opinion, tanks could not be constructed in the manner these tanks were built by Dahnke, so as to form a union between the floor and the walls that would be impervious to the oil; that in order to hold the oil, the floor would have to be laid with the sides as a unit; that the concrete forming the floor and sides should be poured as a unit and there should also be reinforcing of steel rods between the floor and the walls; that the construction, assumed in the hypothetical question put to him, which described the manner of construction by Dahnke, was faulty; that the specimens of concrete, which apparently had been submitted to him, contained an excess of lime, and that the mixture had been made too thin; that apparently some mortar had been used in conjunction with the cement; that there was 11 per cent excess of lime, which gave less strength; that the thinness of the mixture made it porous; that the proportions which had been adopted would not give a mass which would be impervious to oil; that it would not hold water, "not speaking of oil which penetrates through fissures much quicker. From my examination based upon the exhibit, I have the opinion that a tank of the construction of the exhibit would not hold oil under any circumstances." On cross-examination he testified

that it was possible that a tank "of this kind" built to contain 6,000 gallons of oil, would lose 4,000 gallons; that this could seep through, depending on the size of the fissures; that the leakage of three or four thousand gallons of oil might have occurred at the bottom joint, where the sides join the bottom, and if it did, the whole tank might have been drained; that it was "very likely that penetration of the substance in those tanks took place at the junction where the tank sides and the bottom are united. * * * It certainly came out at the bottom it if lost that amount of oil."

One, Williamson, a general contractor and builder, testified that he was employed by Mr. and Mrs. John, to remove the cement tanks in question. Counsel for Dahnke objected that the Johns could not have a claim for the removal of the tanks, unless they first showed that they had requested Dahnke to remove them, and that Dahnke had a right to remove them if they were not to be used. At this point, the court asked whether Dahnke had ever been asked to remove the tanks, and Mrs. John answered, "Yes", and counsel for Mr. and Mrs. John remarked that he had made a similar demand in a letter to Dahnke. Williamson then proceeded to testify to his removal of the tanks and that he took samples of concrete from the tanks, and delivered them to counsel for Mr. and Mrs. John, and he identified certain of these exhibits that were apparently in court. He further testified that when they were taking down the walls of the tanks and got to where the floor and the walls were supposed to be united, we found a crack there * * * it would run from one-eighth of an inch * * * it was not continuous all through, - it was an irregular crack

that it was possible that a man of his right would be
worth 8,000 pounds of oil, which is the 4,000 gallons that
Jake could carry himself, depending on the size of the lim-
ousine; that the leaders of Iran at first insisted upon
of oil which were conveyed in the Iranian fleet, where the
sides join the bottom, and if it did, the world that which
have been denied; that it was "very likely that investigation
of the activities in Iran which that Shah of the Pahlavi
dynasty has had while the Iranian was refined." It
certainly does not at the Iranian is at least one source of
oil."

Cpt. Williamson, a general maintenance and helper,
testified that he was employed by Dr. Wolfgang, John, in the
more the events leads to overthrow. Instead, Dr. Wolfgang
proves that the Iranian oil has been a claim for the revenue
of the Lady, Mahsa Lady (Jake answer that Dr. Wolfgang
is LEADER to Shah's time, and that leader for a right of the
more time if they have not to be used. In this point, the
world makes whether Iranian oil was then been made to return the
Lady, and it, then answered, "Yes", the answer was it.
and the, John remained that he had made a military result to a
Iranian to journey. Williamson then personally to locally to
his remarks of the Lady and that he this leader of Shah's
from the Lady, and Patterson then to answer the Dr. the
man. Then, and to Iranian author to Shah's Iranian oil
were successfully in world. He further testified that the
men taking down the walls of the house and that to the Shah the
floor and the walls were squares so to speak, he found a
crack there - - - it would not for stalagmite of or the - - -
it was not sunshine all through, - it was an irregular crack

that you get in concrete by just a separation of one part from the other"; that it was not continuous around the four walls, but would average half way around the tank. He further testified that he had an opinion as to how the tank should have been built; that it should have been reinforced at all the corners by means of steel rods, and that the floor and walls should have been poured at one time.

One, Peterson, a structural engineer, also testified that tanks such as the ones in question, should be built by pouring the concrete for the walls and floor as a unit, without joints, and that the floor should contain re-inforcing as as to join it to the walls and prevent cracks. This witness was also asked a hypothetical question, describing the tanks involved, and he stated that in his opinion there would never be a union between the floor and the walls that would sustain the stress incidental to 4,000 to 6,000 gallons of oil. On cross-examination he testified that in making a tank as these were made, by laying the floor after the walls had set, the floor was "absolutely certain" to shrink and draw away from the sides or develop minute cracks in the floor proper; that the weight of a 6,000 gallon tank, filled, would be about 200 pounds to the square foot; that oil was one of the most difficult liquids to contain.

Mrs. John testified , denying having any such conversation as Miller had testified to. She also denied that she had ever refused Dahnke or any of his men, access to the basement. She testified that when they found the tanks were leaking, she called Dahnke up and told him "to come right down there, that all the tanks were leaking and to save the oil"; that he sent men down and they did some patching on the outside around

the tank where most of the oil was leaking; that they afterwards discovered one of the other tanks leaking, and they then took some measurements with the ruler and after that Dahnke came over, and she told him to take the tanks out "and the oil, so we haven't got such a very big bill to pay to save it" but that he did not pay any attention, and they then called up the oil company and they came over and made some measurements and found the oil was leaking, and then came the next day and took the oil out. She testified that she told Dahnke several times to take the tanks out and he said he would, but that he never did anything about it. On cross-examination, she testified that it was the 27th of October when she found all the tanks were leaking; that they had discovered a leak in one of the other tanks before that. One of the buildings in question was on Clifton avenue, and she testified they discovered the leaking there first and "after we discovered it, we did not have any more oil put in there." This witness denied saying that they would have to stop using oil because the tenants objected to the smell; that no one spoke of their objection to the noise; that she made no such statement to Miller in the presence of Perusits; that she never talked to them; that they came to the premises and asked for the key and went into the basement.

Dahnke, recalled as a witness under section 33 of the Municipal Court Act, acknowledged receiving a letter telling him he would have to take the tanks out and save the damages Mr. and Mrs. John were going to suffer.

Insupport of his appeal the defendant, Dahnke, contends that the plaintiffs failed to make out their case by a preponderance of the evidence. In this connection, he urges

that the testimony shows that Mr. and Mrs. John did not abandon the use of oil as a fuel by reason of the defective tanks, but rather for the reasons which witnesses, Miller and Ferusits, testified were stated to them by Mrs. John. That testimony was contradicted by her,- both she and her husband testifying that there was no complaint about the oil by their tenants, either because of the odor or noise from the motors. On that conflicting testimony, we could not say that the trial court was not warranted in believing Mr. and Mrs. John and disbelieving the other witnesses referred to. The same is true with reference to the disputed point about the servants of Dahnke being prevented from getting into the basement or repairing the tanks. There would seem to be little, if any, doubt from the testimony in the record, that the tanks were quite useless for the purpose of storing fuel oil. If such tanks, to be effective, should be reinforced with steel rods, and if in constructing them the concrete should be poured as a unit, which was the opinion expressed by every witness shown by the record to be qualified to express an opinion on the subject, it would follow that these tanks constructed by Dahnke, were of no use to Mr. and Mrs. John, and nothing could be done with them except to break them up and remove them. That Dahnke was requested to do this, and agreed to do it, but nevertheless did not do so, is not denied.

The chief contention of Dahnke insupport of his appeal involves the amount of damages allowed by the court. In estimating the damages to be allowed, the court considered the oil which was lost,($949.30), the cost of salvaging the oil that was saved ($125.00), the cost of wrecking the tanks and removing them ($375.00), and the return of the money which John had paid Dahnke on account

of the contract ($422.50), making a total of $1871.80, which was the amount of the judgment entered against Dahnke. It is the contention of the defendant that the proper measure of damages would have been the cost of putting the tanks in such condition that they would not leak. Or, another contention is that the measure of damages should have been the difference between the value of the tanks as they should have been built and their value as they were constructed. In our opinion, these contentions are not tenable. These tanks were being constructed for the purpose of holding fuel oil and the defendant was aware of that fact at the time he made the contract to build them. It must, therefore, be held that the tanks, having been constructed improperly, so as to leak, with the resultant loss of a large quantity of the oil, the defendant was liable for such damages as would reasonably be contemplated in the case of tanks of faulty construction, under such a contract as this, for the purpose stated, which would be the amount of injury that would ordinarily and naturally follow from such a breach under these circumstances. Hadley v. Baxendale, 9 Exch. 341; Ford v. Ill. Refrigerating Construction Co., 40 Ill. App. 222; Benton v. Fay & Co., 64 Ill. 417; Union Foundry Works v. Columbia Iron and Steel Co., 112 Ill. App. 183; Ledgerwood v. Bushnell, 123 Ill. App. 555. In our opinion the court properly adopted that rule in the case at bar.

As a part of the consequential damages claimed by Mr. and Mrs. John, they sought to recover an item represented by the increased cost of coal over oil, which they were compelled to purchase and use following the failure of these tanks. The court held, and we think properly, that that item of damage was too remote. But, it was further held that the return of the money paid under the contract, the value of the oil lost, the cost of salvaging the oil which was saved, and the cost of demolishing and remov-

of the majority (Pp.1,20), notice a dicta of Lord,20, where the
the decree of the lighter minor against another person. It is the same
feeling of the Schedule that his lawful remedy of recovery which
have been the cost of filing the bribe to such conditions that one
could not take. Or, another contention is that the remedy of
lawyers could give that the mortgagee taking his value of the
property be the period who that will not lose value be they were
mortgaged. In the lawsuit, those conditions are not known.
There seems very little authority for the process of holding
that all not the interest not owing of that that of the time
as was the original is held free. It seems, therefore, to lack
that the bribe, having been substituted independently, or at a lawsuit,
all the original lawsuit is a large quantity of the all, the re-
fusing her lawful to some damage as such a remedy be same
thinking in the view of taking a fully mortgaging, taking such
a mortgage as this, for the purpose stated, that would be the
amount of laying that the fraudulently and knowingly filing from
when a lawsuit under their circumstances. Dicta v. Dunlopp,
2 Swan. 243; Ford v. Ala. Mortgagee Insurance Co., 6 Ill.
App. 322; Jackson v. Jan 1 Co., 64 Ill. 47; Ohio Farmers Ins. v.
Michigan Sum and Loan Co., 112 Ill. App. 183; Lawrence v. Alde-
rman, 108 Ill. App. 322. In our opinion the court properly charged
that rule is not made in law.

In a part of the mortgagor's average stated by Co.
and Van. Dice, the right to recover on time substituted by
the insurance case of Ind Power Co., which the more complaint is
wrongful and the following the filing of Ohio Jackson. The right
held, and as this property, that that time of damage was the rule
made. Ins.Co was further held that the remedy of the money paid
under the mortgage, in view of the all lawful the rule of mortgage
the use all which was sued, and the rule of mortgagee and remedy

ing the tanks, were items which could reasonably be considered as being within the contemplation of the parties. In our opinion all of these items were properly allowed.

Defendant, himself, in his brief filed in this court, states that in addition to the measure of damages, contended by him to be the proper one "it is probable that * * * appellees (Mr. and Mrs. John) were entitled to the value of oil lost by reason of the imperfections in the tanks, if such were proven to the satisfaction of the court." As above stated, we are of the opinion that the other items were also properly allowed. 3 Sutherland on Damages (4th Ed. Sec. 705); Dickson-Woods Co. v. The Phillips Glass Co., 169 Pa. St. 167; Livermore Foundry and Machine Co. v. Union Compress and Storage Co., 105 Tenn. 187; Crowley v. Burns Boiler and Manufacturing Co., 100 Minn. 178.

For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

(1670)

158 - 27634 Opinion filed May 9, 1923.

CHRIST W. DAHNKE, Appellant, v. BERTHOLD JOHN and HELENA JOHN, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

230 I.A. 643

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Dahnke, brought this suit against the defendants, Mr. and Mrs. John, to recover $672.50, claimed by Dahnke to be due him as a balance on the contract price of certain concrete tanks built by him for the Johns. The defendants filed an affidavit of merits setting up that the tanks were to be built for the storage of fuel oil; that they were not constructed in a workmanlike manner and were not suitable for the purpose for which they were intended; that the defendants paid the plaintiff $422.50 on account, under a misapprehension, and that such payment was not supported by a good consideration, in that the tanks were not capable of holding oil and that the defendants were not indebted to the plaintiff in any sum. The defendants further filed a plea of set-off, claiming damages resulting to them from the attempted use of the defective tanks. The defendants later filed a separate suit against Dahnke, to recover these damages. These two cases were tried together, under the circumstances and stipulation of the parties which we have recited in full, in the opinion handed down this day in case general No. 27633 in this court. As pointed out in that opinion, when these two cases came up for trial, before the court without a jury

a jury, it was in substance stipulated that although the cases were to be considered as separate cases, they were to be tried together on testimony which was to be submitted by the respective parties, and the substance of the stipulation entered into as to the conduct of the trial was to the effect that the evidence which was to be submitted to the court, with reference to this controversy, and in support of the position of Dahnke, on the one hand and Mr. and Mrs. John on the other, was to be considered by the court as the testimony submitted by the parties in connection with each of the cases.

In support of his claim for the balance alleged to be due him, on the contract price of these tanks, the plaintiff submitted certain evidence, the substance of which we have set forth in the opinion filed this day in case Gen. No. 27633. When the plaintiff rested at the close of his testimony, the defendants made a motion that the court find the issues in their favor and enter judgment accordingly. That motion was allowed and judgment was entered in favor of the defendants. To reverse that judgment, the plaintiff has perfected this appeal.

In support of the appeal it is the plaintiff's contention that the court erred in entering judgment at the close of his case, by reason of the fact that the testimony submitted by him made out a prima facie case. On the other hand, it is the contention of Mr. and Mrs. John that the evidence failed to make out a prima facie case. In our opinion that question is not material, in view of the manner in which these cases were tried and the issues submitted to the trial court, and the stipulation into which the parties entered with reference to the consideration of all the evidence submitted to the court as the evidence in each of the cases. Assuming that the testimony sub-

a jury. If you in reference stipulated that attorneys who were to be considered as experts among, they were to be asked opinion on testimony which was to be examined by the respective parties, and the attorneys of the stipulation referred (as to the records of the trial was if the effect that the witness which was to be submitted to the court, will referred to this controversy, and in accordance of the position of Jones, on the one hand and Mr. and Mrs. Jones on the other, was to be considered by the court as the testimony rendered then by the parties in connection with each of the cases.

In support of his claim for the Jones stipulated to a due bar, on the doctrine prior of these issues, the plaintiff submitted certain evidence, the testimony of which we were not deep in the opinion filed this day in this Ben. No. 2706. When the plaintiff rested at the close of his testimony, the defendants made a motion that the court then and therein in their favor and order judgment accordingly. This motion was allowed and judgment was entered in favor of the defendants. In reversing that judgment, the SUPREME COURT THEREBY DID HOLD:

In support of the ground 44 in the plaintiff's case, Counsel for the court erred in sustaining demurrer of the defendants, by reason of the fact that the testimony submitted by the plaintiff was a Prima Facie case. On the other hand, it is the contention of Mr. and Mrs. John that the evidence failed to make out a Prima Facie case. In our opinion this question is not material, in view of the manner in which these cases were tried and the issues submitted to the trial court, and the stipulation this which the parties entered into STRAWBERRY in the consideration of all the evidence submitted to the court on the trial. Since in such of the cases, assuming that the testimony sub-

mitted by Dahnke made out a *prima facie* case and that the trial court therefore erred in finding the issues for the defendants and entering judgment against the plaintiff after the plaintiff had rested, we nevertheless are of the opinion that the judgment should be affirmed. After that action of the trial court disposing of the case brought by Dahnke, the parties proceeded with the testimony in support of the suit for damages brought by Mr. and Mrs. John, and on consideration of all the testimony and considering it as submitted in connection with the case brought by Dahnke, which we deem entirely proper, in view of the stipulation between the parties, it is clear that the only judgment which could properly be entered in that action, was the one which the court did enter. For the reasons stated the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

[illegible] by Johnson made out a prima facie case and that the trial court's discretion erred in finding the lower tribunals [illegible] and entering judgment against the plaintiff after the plaintiff had rested, we overrule one of the contention that the judgment should be affirmed. After this review of the trial court's discretion of the case brought by Johnson, the question presented with the testimony in support of the suit for damages brought by Mr. and Mrs. John, and on consideration of all the testimony and evidence, it is submitted in conclusion as the case brought by Johnson, which we deem entirely proper, in view of the stipulation between the parties, it is clear that the only judgment which properly be entered in this action, was in the one which the court did enter. For the reasons stated the judgment of the municipal court is affirmed.

"Judgment affirmed."

PATTON AND BLANKENSHIP, JJ., CONCUR.

(31/12)

189 - 27665 Opinion filed May 9, 1923.

CHARLES H. LENSKE, Appellant, v. ROBERT A. POTTINGER, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

230 I.A. 341

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff, Lenske, an architect, brought this action against the defendant, Pottinger, to recover $5,000.00, which he claimed was due him for services as an architect in drawing certain plans and sketches. The plaintiff was employed during the day as an architectural draftsman for the Board of Education, at a salary of $2100.00 a year. The work which he claimed to have done for the defendant was done at his home, evenings and Saturdays and Sundays. The work which the plaintiff claimed the defendant had hired him to do was pursuant to certain oral agreements which the plaintiff testified were entered into between the parties in March, May and November of 1919. The plaintiff testified that the work on the contract entered into in November 1919, was completed January 26, 1920, with the delivery of certain blue prints.

On cross-examination, the plaintiff admitted that he received a check from the defendant, dated January 8, 1920, for $69.14, on which was the notation "In full to date, architectural work done for R. A. Pottinger"; that upon receiving this check, he, the plaintiff, added to the above notation the following, "on the 36 apartment hotel located at 4028-30 Irving Park

Boulevard, and prospective drawings on roller skating rink", and that after he had added these words, to the check he cashed it. The plaintiff further admitted, on cross-examination, that he received another check from the defendant, dated March 27, 1920, for $83.40, which he retained for some three months and then returned to the defendant. It further appears from the record that under date of June 14, 1919, the plaintiff submitted a statement to the defendant, apparently for work done under the contract of May 27, 1919, which involves charges for certain sketches with revisions and blue prints, these items aggregating a charge of $76.84. While testifying in this case, with reference to the work done by him under this contract, he testified it was reasonably worth $2500.00.

When the defendant sent the plaintiff his check for $67.14, on January 8, 1920, whatever claim the plaintiff may have had against the defendant was unliquidated and in dispute between the parties. Upon receiving that check marked, "in full to date, architectural work done for R. A. Pettinger", the plaintiff was obliged either to accept it, in payment of his account up to that time, or return it. Under no circumstances, had the plaintiff any right to add a limitation to the stipulation which had been written on the check by the defendant, and then cash it. His action in retaining the check and cashing it, was an accord and satisfaction of the account between the parties up to that time.

It seems from the record that some further work was done by him after that date, and on March 20, 1920, there was a further remittance by the defendant to the plaintiff in the sum of $83.14. After the plaintiff had retained that check for some three months he sent it back. The affidavit of merits filed by

the defendant, was to the effect that he had a good defense to the plaintiff's suit upon the merits to the whole of the plaintiff's demand, "except as to the sum of $83.14." In our opinion the plaintiff submitted no evidence that would justify a judgment in his favor for any amount beyond that. For some reason, the trial court did not take into consideration the admission of the defendant that he was in plaintiff's debt to the extent of $83.14, but, on the other hand, directed a verdict for the defendant.

For the reasons stated the judgment of the Municipal Court is reversed and judgment for the plaintiff is entered here for $83.14. Plaintiff to pay costs in this court.

JUDGMENT REVERSED AND JUDGMENT HERE.

TAYLOR AND O'CONNOR, JJ., CONCUR.

208 - 27684

Opinion filed May 9, 1934.

DON C. COULTRAP,

Appellee,

v.

E. McNEAL & COMPANY,
a corp.,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

230 I.A. 344

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal, the defendant, E. McNeal & Company, seeks to reverse a judgment for $7,124.25, recovered by the plaintiff, Coultrap, in the Municipal Court of Chicago.

Coultrap lived in Franklin, Pennsylvania, where he was connected with an investment company dealing in stocks and bonds. That company was made up of five individuals, one of which was a man named Biery, who was also president of the Biery Oil Company, incorporated under the laws of Delaware, with home office located at Franklin. That Company was engaged in refining, marketing and exporting petroleum products. It had an authorized capitalization of one-half million shares of preferred and one million shares of common stock, both with a par value of $10. In July, 1920, preparations were being made to list the stock on the New York curb and that was done in August of that year. In July, the stock, both preferred and common, was selling in the market above par.

Under date of July 8, 1920, the defendant wired several people living in Franklin, Pennsylvania, the home town of the

Biery Oil Company, offers of sale of "Biery Oil preferred or common". One such telegram was directed to one Armour, reading, "Offer you subject eight hundred five Biery Oil preferred or common one fifteen share net answer." This message was apparently sent by the defendant in response to an inquiry received from Armour, for under date of July 9, the defendant wrote Armour acknowledging receipt of his inquiry and confirming its telegram of the previous day and in the letter the defendant said, "We have no idea what this stock is selling for in your market but our client has put a price on it and if you cannot use same at the price he has set, will you be good enough to submit us a counter bid."

The plaintiff saw these messages from the defendant. He testified he was led to believe someone was trying to hurt the market. On cross-examination he testified that the price quoted did not cause him to feel there might be some misunderstanding or mistake for the common stock had been offered as low as $5.00 per share and the preferred $7.50 per share during the previous year and he had heard of sales "where people had given common stock as a bonus that had been selling among individuals at a few dollars a share."

Upon seeing these offers, such as the one from defendant to Armour dated July 8, the plaintiff on the morning of July 9, saw Biery and told him he was in a position to purchase a block of Biery Oil Company common stock and asked him if he would be in the market for it at par, and this resulted in Biery agreeing to purchase from plaintiff 805 shares of the common stock at $10 per share.

The plaintiff testified he began his correspondence

Sandy did thought, when he was at Tilbury his preference so
evident". The good tolerance was intended to mre amusing, nsah-
lan, "Tell me you wished much instead this Harry Hil preferred
to remain his fifteen years old.(memory)" This evening was
accompanied even by the interest in throughs Dr so insight re-
ceived from Arthur, his mother late at daily 9, the determine
which Amour advantageously thought of his leaving and noticing
the delegrum of the previous day and in the letter the relaxa-
ant said, "We have to take care this issue is selling for is
your manage his our military has not a money on it and if you
cannot use some of the price for her and, will you be used among
be school in a military job."

The identity was those remarks from the mystery.
He satisfied he was for to tell those reason the Sybil is long
the million. Is overwhelmingly to intellect that we join
marked his red mouth his to fall short might be more elucidate
attacking or wonder for the reason that has been attract to
law as 1,[illegible] pm above and the platform 11,41 per hour day-
ing the practice year not to his board of Adler's Sybil and
gives reason which so a home line has been selling among existe-
nce at a the relies a since.

Have making their effort, such as the our from talked
not to Amour dated July 8, the disaster on the morning of July
9, was Harry was a it him he was in a position to increase a
block of Sibyl and Jeremy common where was asked his is he
would he is the worked for it at par, and this resulted in Harry
appealing to Sybil's Tr'w disbelief his shares of the house
stock at 110 per share.

The immediate benefits to have his mercenaries

with defendant on July 3, writing the defendant "telling them I understood they had some (Biery Oil Stock) for sale"; that his first bid was on the 7th or 8th; that no bid was accepted before the 12th. The first communication between the parties introduced in evidence, is dated July 12. It is a telegram from the plaintiff to defendant, reading, "Bid one fifteen, 805 Biery common or preferred." On the following day, July 13, the defendant, apparently in reply to that wire from the plaintiff, telegraphed him as follows: "were unable to reach our client yesterday on Biery Oil and Gas. Please renew bid. Believe party has eight hundred five common, same number preferred. Can you use both. Please give reference."

On the same day, July 13, plaintiff wired back to defendant, "Bid one fifteen firm eight hundred five Biery Common Preferred. Reference Franklin Trust Company." Again on the same day the defendant apparently mailed plaintiff a confirmation of this sale on one of its bill heads reading as follows:

"We confirm the sale to you today of

Quantity	Description	Price	Amount"
805	Biery Oil and Gas	$1.15	$925.75.

On the following day, July 14, the defendant sent the plaintiff the following message, apparently a telegram, "Confirm sold you eight hundred five Biery dollar fifteen. Will ship draft attached. Confident can secure eight hundred five additional same price on order. Answer if wanted." On the same day the defendant wrote the plaintiff a letter acknowledging receipt of plaintiff's "wire of yesterday", reading "Bid one fifteen eight hundred five Biery common or preferred. Reference Franklin Trust Co.", and repeating its wire of that morning reading, "Confirm sold

you eight hundred Biery dollar fifteen. Will ship draft attached. Confident can secure eight hundred five additional same price on order. Answer if wanted," and in this letter defendant went on to say that a confirmation of the sale had been mailed to the plaintiff the previous evening as they had closed with their client late in the afternoon and that "the stock will be shipped under draft attached through the Franklin Trust Company". The defendant then thanked the plaintiff for this item of business and closed their letter by saying "if you can see your way clear to give us an order for 805 shares additional, feel reasonably confident we can secure it as we are in touch with a like amount."

Apparently the plaintiff did give the defendant his order for the additional shares but this was not accepted because the defendant wrote the plaintiff under date of July 16, saying, "We have your wire stating you could buy 805 shares additional of Biery Oil at $1.15. Have been unable to bring out additional offerings. Will wire you just as soon as we have anything definite to offer."

On July 20, the defendant forwarded to the plaintiff through the Franklin Trust Company, 81 shares of the common stock of the Biery Oil Company, with draft attached for $931.50. On that day the defendant wired the plaintiff, "Shipping eighty one shares Biery common today thru Franklin Trust Company." On the same day the defendant wrote the plaintiff as follows, "We wired you today that we are shipping 81 shares of Biery Oil Company' common stock, draft drawn on you through the Franklin Trust Company at the rate of $1.15. We find the certificate is for 81 shares, therefore are drawing draft on you for $931.50. We are not in a

position to offer you additional stock at the present time but will thank you for this item of business and should we have further offerings will gladly submit same."

Presumably that stock arrived in Franklin on July 21. On the following day the plaintiff left for Chicago where the defendant was in business and on July 23, with his attorney, he called at the defendant's office and talked with Mr. McNeal and Mr. Turley of that firm. With reference to this conference, Turley testified that the plaintiff "wanted to know about the shipment of Biery Oil Stock" and he told plaintiff it had been shipped on the 20th; that plaintiff asked when the balance of the stock would be delivered and that the witness replied, that defendant had complied with the order, "shipping such stock as had been delivered to us; the stock had a par value of ten dollars, which we supposed prior to that had a par value of one dollar. Our client, instead of shipping 805 shares as specified in his telegram shipped 81 shares of the Biery Oil Company with a par value of ten dollars, with a market value of eleven. We told him we had completed the contract and shipped the stock in full." This witness further testified that the plaintiff's attorney said something about the confirmation of the sale of 805 shares, and "we told him a mistake had occurred, that our client instead of shipping 805 had shipped 81 shares of a par value of ten dollars." McNeal also testified that when the plaintiff called at the defendant's office on this occasion he, (McNeal) explained that it was his understanding that the plaintiff's order had been completed.

The plaintiff also testified as to the conference in the defendant's office on July 23; that he told Turley at that time that he had called to see him about "the 805 shares of Biery Oil stock" he had bought from defendant; that he asked if defendant

was going to deliver the stock; that Turley said he had been unable to fill the order; that he had sent 81 shares with draft attached to the Franklin Trust Company; that he told Turley his order was for 305 shares and Turley claimed it was for 81; that McNeal said that there was nothing that could be done, that it was a mistake on their part; that they claimed "they had secured the market and had not been able to pick up any of this stock for less than $12.50 per share" that they asked plaintiff if he thought they "would be fool enough to go out and pay $12.50 a share and sell it to you for $1.15".

The plaintiff, being unable to procure the stock he claimed the defendant had contracted to sell him, brought this suit to recover the difference between its market value and the contract price. The judgment recovered is apparently based on a market value of par.

In support of its appeal the defendant contends that the trial court erred in denying its motion, made at the close of all the evidence; that the court instruct the jury to find the issues in its favor; that the evidence shows no contract was concluded between the partics for the purchase and sale of stock of the Biery Oil Company; that in making the offers it did, defendant was intending to sell stock of the Biery Oil and Gas Company; that the great difference between the price at which the stock was offered and its then market price was such as to put the plaintiff on notice that the stock being offered was not that of the Biery Oil Company. The testimony is that Biery is not connected with any oil company other than the Biery Oil Company and that there is no such company as the Biery Oil and Gas Company. This testimony is not denied. Turley testified that he could not say of his own knowledge whether there was any such

company or not.

The defendant does not claim that there was any mistake or inadvertence, either in the writing or the transmission of any of its messages to the plaintiff. A number of cases, involving situations of that kind, to which the defendant has called our attention, have no application to the facts involved here.

The claim which the defendant makes in support of its appeal is "that it intended to sell Biery Oil and Gas stock of the par value of one dollar per share." It seems quite clear from the record that this is purely an afterthought. There is no intimation in the affidavit of merits, filed by the defendant, that defendant was then claiming that its offers of sale or its acceptance of plaintiff's offer to buy, contemplated a stock which was different than the one plaintiff claimed was involved in their contract. While being cross-examined by counsel for plaintiff under rule 33 of the Municipal Court, Turley admitted "he knew about the Biery Oil Company". In the early part of July, the defendant was making offers to people in Franklin, Pennsylvania, by wire and mail, from its office in Chicago, of "Biery Oil preferred or common" at $1.15 per share. Franklin was the home town of the Biery Oil Company. At this time it received the offer of the plaintiff to buy "805 Biery Common or Preferred" at $1.15. Defendant, then replied that it had been unable to reach its client on "Biery Oil and Gas" on the day plaintiff's offer was received and asked him to renew his bid. Plaintiff replied bidding "firm" at $1.18 for 805 "Biery Common Preferred." To this defendant replied on the same day by letter confirming its sale to plaintiff of 805 shares "Biery Oil and Gas" at $1.15 and on the following day by wire, reading, "Confirm sold

company or not.

The defendant does not claim that there was any mistake or inadvertence, either in the writing or the transmission of any of its messages to the plaintiff. A number of cases, involving situations of that kind, to which the defendant has called our attention, have no application to the facts involved here.

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you 805 Biery $1.15". On the same day this wire was sent, the defendant again wrote the plaintiff acknowledging receipt of plaintiff's bid of $1.15 for 805 "Biery Common or Preferred" and quoting its telegram of confirmation or acceptance selling plaintiff 805 "Biery" at $1.15. We hold that the evidence establishes the fact that the minds of the parties met on the purchase and sale of 805 shares of stock of the Biery Oil Company at $1.15 per share. That such is the fact and that in all its communications the defendant was referring to this stock, is confirmed by the fact that a few days after this interchange of messages with the plaintiff, the defendant, in an apparent attempt to fulfill its contract with the plaintiff, shipped him 81 shares of the common stock of the Biery Oil Company with the statement that they were attaching draft "at the rate of $1.15", although the draft accompanying the shipment is based on a price of $11.50 per share. The defendant now takes the position that this shipment had no reference to its prior communications to or correspondence with the plaintiff, which had to do with Biery Oil and Gas Company stock, but amounted to an independent offer to sell 81 shares of the Biery Oil Company for $931.50. That such is not the case is patent. Inits confirmation of sale, pursuant to plaintiff's original offer and its acceptance, the defendant advised the plaintiff that it would ship the stock, draft attached, "through the Franklin Trust Company". In response to defendant's request for reference, plaintiff had given the Franklin Trust Company. When the defendant shipped the 81 shares of Biery Oil Company Common, on the 20th, it was accompanied by a draft and was sent through the Franklin Trust Company, and the defendant wrote it was forwarding the stock with draft attached "at the rate of $1.15," which was the plaintiff's bid price as well as the price mentioned in the messages defend-

ent had sent. At the same time the defendant was trying to induce plaintiff to buy more of this stock, and plaintiff did so and the defendant acknowledged receipt of plaintiff's wire offering to buy "805 shares additional of Biery Oil "at the same price. Further confirmation of the fact that the defendant, in all its negotiations was referring to the stock of the Biery Oil Company, to whose home town it had been sending its offers, is found in the fact that after it had sent 81 shares of the stock of that company, pursuant to its contract to sell 805 shares, and the plaintiff came to Chicago and asked when the balance would be furnished, the defendant, even then, made no claim that it had never intended offering or selling the stock of the Biery Oil Company but rather that of the Biery Oil and Gas Company. It never mentioned any such Company but rather took the position that it had fulfilled its contract by shipping the 81 shares of the Biery Oil Company. There was then no claim of any mistake in the identity of the company but the only mistake referred to by the defendant at that time was not a mistake of the defendant but rather of its correspondent, with whom it apparently had been negotiating for the purchase of the stock which it, in turn, was selling to the plaintiff, the mistake being, as Turley put it in his testimony, "that our client instead of shipping 805 had shipped 81 shares of a par value of ten dollars. According to his (defendant's client's) telegram, there were 805 shares, supposedly, at a dollar par." In other words, by reason of some mistake which its correspondent had made, in making an offer of sale, defendant took the position, that it should not be required to fulfill the contract it had made with the plaintiff. Of course, such a position is untenable.

Where, from the terms of a contract or from what the

parties wrote or said at the time, or from what they did, their intention is clear, they will not be heard to say that, in fact, they had a different intention. They will be presumed to have had the intention which their language and their actions import. Williams v. Fletcher, 129 Ill. 356. From all that the defendant wrote and said and did, at the time, it is too clear for any reasonable controversy, that no stock was being considered except that of the Biery Oil Company. If, relying on an offer of a correspondent, to sell 805 shares at a satisfactory price, the defendant made an offer to sell that amount to the plaintiff at $1.15, the defendant assuming from its correspondent's offer, that thepar value of the stock was $1.00, and the plaintiff accepted the defendant's offer, the defendant cannot escape the fulfillment of its contract on the ground that its correspondent misled it or failed to deliver the stock as agreed.

The defendant offered in evidence some of the correspondence between it and its correspondent, and it is contended the trial court erred in sustaining plaintiff's objection to it. In our opinion it was incompetent and the court properly kept it out of the record. Even if it had been admitted, we fail to see how it could have helped the defendant's case. All that was offered was dated later than the dates upon which the defendant was shown to have offered the stock to the parties in Franklin at $1.15 and later than the date of the plaintiff's bid at that figure. The only purpose of this evidence, according to the defendant, was to show its intention to buy Biery Oil and Gas stock from its correspondent, thus showing that its intention, in making offers of sale or accepting plaintiff's bid, was to sell that stock. We have already stated why we are of the opinion that the defendant

parties would so hold at the time, so from what they said, their intention is clear, they will not be heard to say that, in fact, they had a different intention. They will be presumed to have had the intention which their language and their actions import. Williams v. Fletcher, 129 Ill. 356. [illegible] that the defendant [illegible] and made his bid, at the time, it is not clear that any plaintiff understood, that no stock was being [illegible] except that of the [illegible]. If, relying on an offer of a correspondent, he sold his shares to a satisfactory buyer, the defendant made no offer to sell such shares to the plaintiff at $1.15, the defendant accepting from his correspondent's offer, that higher value of the stock was $1.50, and the plaintiff accepted the defendant's offer, the defendant cannot escape the obligation of his contract on the ground that the correspondent making it so failed to deliver the stock so sold.

The testimony offered by plaintiff [illegible] of the circumstances under which it was the correspondence, and it is contended the trial court erred in sustaining plaintiff's objection to it. In our opinion it was incompetent and the court properly kept it out of the record. Even if it had been admitted, we fail to see how it would have helped the defendant's case. All that was offered was dated later than the dates upon which the defendant was shown to have offered his stock to the plaintiff in Franklin at $1.15 and later than the date of the plaintiff's bid at that figure. The only purpose of this evidence, according to the defendant, was to show his intention to the effect that he was stock from his correspondent, this showing that his intention, in making offers of sale or accepting plaintiff's bid, was to sell that stock. We have already stated why we are of the opinion that the defendant

was not in a position to submit proof of any such intention.

On the contrary, the communications from the defendant to people in Franklin, other than the plaintiff, were admissible on several grounds. These communications offered "Biery Oil Preferred or Common" at $1.15 per share, just the price bid by the plaintiff after he had seen some of these communications. When defendant was making offers of "Biery Oil" stock in the home town of the Biery Oil Company, it very strongly tended to show what stock it was the defendant was offering to sell. According to the testimony of the plaintiff, these offers which the defendant had sent to parties in Franklin other than the plaintiff, had been discussed on the occasion of his visit to the defendant's place of business in Chicago on July 23.

The defendant further contends that the trial court erred in the charge to the jury. At the conclusion of the court's charge, the trial court asked if either counsel had any suggestions in the matter and counsel for the defendant stated that he desired an exception to the failure of the court to give the substance of the instructions requested in writing by the defendant. The trial judge then stated that under the rule, counsel was obliged to be specific as to such objections as he might have to the court's charge. Counsel then made certain specific objections, none of which, in our opinion, were well taken.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

279 - 27755.

Opinion filed May 9, 1923.

E. N. DUERLEIN, trading as E. N. Duerlein & Company, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
ROBERT NORDIN, Appellant.	

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Nordin, seeks to reverse a judgment for $500.00 recovered in the Municipal Court of Chicago, by the plaintiff, Duerlein, in a suit brought by the latter based on an oral contract, whereby the plaintiff claimed the defendant had retained him to procure a tenant for certain premises in the City of Chicago, which tenant the plaintiff claimed he had procured and for which services he alleged the defendant agreed to pay the usual and customary broker's commission.

In support of his appeal the defendant urges that the trial court erred in admitting the testimony of one, Radke, an agent of the plaintiff, as to a certain telephone conversation which the witness testified he had had with the defendant. It is claimed that this evidence should not have been admitted because the witness was unable to identify the voice of the defendant. This contention, in our opinion, is not borne out by the record. The witness, Radke, testified that he was one of the plaintiff's salesmen; that previous to the transaction involving this lease, he had not known the defendant personally but he had seen him in the plaintiff's office several times.-

the last time about two months prior to this lease transaction, on which occasion the defendant was in the plaintiff's office about three quarters of an hour, during which time he was seated about three feet from the witness talking to another man in the office. This witness further testified that he was in the plaintiff's office on March 13, 1920, in the forenoon, and the telephone rang and he answered it; that he did not know who the party on the other end of the wire was, until he mentioned his name, and then he recognized the voice of the defendant. The witness testified: "I did not recognize it as long as he said, 'Hello'. I did after he had spoken for a while." On cross-examination the witness said he based his knowledge of the defendant's voice on the fact that he saw him in the plaintiff's office on two occasions, two months prior to this telephone conversation, and that he heard him talking at that time. In our opinion the telephone conversation was admissible.

It is further contended by the defendant, in support of his appeal, that the trial court erred in refusing his motion for a peremptory instruction at the close of the plaintiff's case, and also that the verdict of the jury is contrary to the manifest weight of the evidence. These contentions are largely based on the fact that the plaintiff's witness, Radke, fixed his conversation over the telephone with the defendant, Nordin, in which it is claimed Nordin listed the property in question with plaintiff's office for rental, as having occurred on May 13, 1920. The record shows that the defendant consummated a lease on these premise with one Cummings, and it is the plaintiff's contention that Cummings was directed to the defendant, and had his attention called to the defendant's property by the plaintiff. In his testimony Cummings stated that he went to in-

spect the defendant's premises "around the 9th of May, 1920." On cross-examination, he testified: "I am not sure of the date. I did not say, May 9; I said around May 9. * * * It was not later than May 10." It is argued by the defendant that this evidence demonstrates the fact that Cummings was not directed to this property by the plaintiff, as it is the plaintiff's evidence that the defendant did not list the property with his office, until May 13. In our opinion, the judgment for the plaintiff was proper, notwithstanding the evidence referred to. It is apparent from the record that Cummings was in doubt about the time of his visit to the defendant's premises. That this visit was the result of his attention being called to the property by the plaintiff's office is established by the evidence, clearly. Radke testified that after he had his conversation with the defendant, over the telephone, he went over to see Cummings, and gave him full particulars about this building and asked him to go and look it over. Cummings testified that after talking with Radke, he went down to the defendant's premises and looked them over, and that he met the defendant on the premises. He testified that the defendant wanted to know how he had learned about the premises, and the witness said he told the defendant he was sent there by the plaintiff. He further testified that he discussed terms with the defendant; that they came to an agreement and that the defendant said he would have the lease drawn up by his lawyer; that the witness raised some question about that, saying that he was renting the premises through the plaintiff, and defendant replied that "it would be all right, the Duerlein people were getting credit for the rental of that building." He further testified that the lease in question was duly consummated.

The defendant's testimony was flatly contradictory to both that of Radke and Cummings. He denied having any telephone conversation with Radke, either on May 13, or any other time. He admitted having a conversation with Cummings, but he testified that when he asked Cummings who had sent him to his premises, Cummings did not say that the plaintiff had sent him, but he stated that he had seen the premises advertised in the "Tribune." The defendant testified that he had advertised the premises in the Tribune, for sale, and when Cummings visited the premises, he said he would like to rent them but the defendant said he did not care to rent but would like to sell, but that he would consider renting; that Cummings returned the next day, and he concluded to rent to him. In our opinion the judgment is not against the manifest weight of the evidence. The defendant's motion for a peremptory instruction was properly overruled.

We find no error in the record and, therefore, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

298 - 27774

Opinion filed May 9, 1923.

ESTHER MURRAY, Appellee, v. CITY OF CHICAGO, Appellant.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, City of Chicago, seeks to reverse a judgment for $4,000.00, recovered in the Superior Court of Cook County, by the plaintiff, Esther Murray, in a suit brought by her to recover damages against it because of injuries alleged by her to have been received as a result of falling into an unguarded ditch, which had been dug in connection with the laying of some conduits or cables, to be used in connection with the lighting system of the City.

In support of its appeal the defendant contends that the evidence relied upon by the plaintiff, to connect the physical conditions of which she complained, with the injuries she received when she fell into the ditch, was wholly insufficient, and that the damages assessed by the jury are excessive, indicating that the verdict was the result of passion and prejudice. The plaintiff testified that when she had this fall, she received contusions resulting in black and blue areas along one leg from the hip to the knee; and her daughter testified to the fact that there were black and blue marks on her back. Almost immediately after her fall the plaintiff noticed blood in the urine, and soon after she experienced a bloody flow from the

vagina, which she testified continued for some 11 days; when, as a result of some medicine the doctor had given her for this condition, it stopped, and about a week later it started in again and continued off and one for almost four months. The plaintiff testified that after this fall her back was so sore she could not lie on it, and it hurt her to such an extent that she could not sit in bed. She said that she had been suffering from her back ever since; that she experienced "awful bearing down pains, through the front of me when I walked" and that she never had had any of these pains before this fall. The doctor who treated her at the time, was not available as a witness at the time of the trial; the plaintiff testifying that when she tried to telephone him to attend the trial as a witness, she discovered that he had gone to California several weeks before.

It seems that some time after the plaintiff received her injury, she was treated by a Dr. Paul, who appeared at the trial and testified. His testimony was to the effect that the plaintiff was suffering from retroversion of the uterus. He described it as a high degree of retroversion. He further testified that he had made a number of urine examinations, which showed considerable pus, indicating an inflammation of the kidney or bladder or both. He also testified that the plaintiff's nerve reflexes were exaggerated, showing evidence of nervous irritability. He gave it as his opinion that the retroversion of the uterus was caused by the fall the plaintiff had experienced and that the inflammations resulting in the pus in the urine were related to the injuries the plaintiff received at that time. He also stated that the condition of the uterus was permanent and that the only way in which it might be relieved was through an operation.

The plaintiff had had ten children. Dr. Paul testified that it was common in cases of women with a large number of children to experience a retroversion of the uterus; that entirely apart from the physical history of the plaintiff, he would attribute the condition of her uterus to the number of children she had had, but that in his opinion, taking into consideration the physical history of her case, including the fact that she had never had any trouble in connection with the birth of her children, that she had experienced no retroversion prior to this fall and had had no pains in her back and abdomen, prior to that time, but that since the fall she had experienced all of these things, it was his opinion that the cause of her physical ailments was the fall into this open ditch, which was the basis of the plaintiff's suit. There is no evidence in the record to the contrary. On this record we are unable to say that it was against the manifest weight of the evidence for the jury to find that the plaintiff was suffering from serious disorders, and that their proximate cause was the one alleged by her in her declaration. We are further of the opinion that the damages cannot be said to be excessive.

The only other error urged in support of the defendant's contention that the judgment should be reversed, has to do with the alleged misconduct of counsel of the plaintiff in his argument to the jury. In his closing argument to the jury, counsel for the plaintiff said, "They can make their contracts with Cummings, if they wish, and can come back against the Cummings Company afterwards; but we cannot hold anyone responsible but the City of Chicago, because she is a citizen dealing with the City, and Cummings is either some agent or a contractor of the City of Chicago." It is this argument that the defendant now contends furnishes sufficient cause for reversal of the judg-

ment and remanding the cause for a new trial. The record shows that the plaintiff originally brought this suit against the City of Chicago and William F. Cummings, the latter being a contractor who was laying the cables or conduits, under the authority of the City, in connection with the City's street lighting system, as an incident to which work, there had been opened the ditch into which the plaintiff fell. After the suit was started and before it was reached for trial, the plaintiff dismissed the suit as against Cummings. It is apparent that the argument of plaintiff's counsel, of which the defendant now complains, was provoked by the preceding argument of counsel for the defendant. In the course of his argument counsel for the defendant addressed the following remarks to the jury: "We are here. Where is the Cummings Company? They are not here, but we are here and they are trying to stick us for that." Counsel then called attention to the fact that the suit had originally been begun "against the City of Chicago and the Cummings Company." Counsel then proceeded to say: "Now the City of Chicago is standing here by itself trying to defend the City from a claim of this plaintiff. I say the City of Chicago should not pay a cent. I say if anybody is at fault, it is the Cummings Company. * * * The Cummings Company are not here; they are not defending when they are the party that should be defending. They are the party that got the money from the City of Chicago to do the work and did it properly and I say, gentlemen of the jury, Mr. O'Brien should have them defending this case and not us. I don't know why Mr. O'Brien has objected so strenuously about referring to the Cummings Company. I have that right. * * * I haven't any right to come in here at this time and ask that the tax payers of the City of Chicago should contribute to Mrs. Murray. They have someone they can go against if they want." Counsel for

the plaintiff repeatedly objected to this line of argument, the court over-ruling the objections and permitting the argument to proceed. In our opinion, the objections of the plaintiff's counsel should have been sustained. As to the statement of plaintiff's counsel which followed, in his closing argument, which the defendant now urges as cause for reversal of the judgment, it is sufficient to say, as this court said in Dunham v. Chicago City Ry. Co., 178 Ill. App. 192: "Plaintiff's counsel appeared to have furnished the ammunition for the explosion which followed and is not, therefore, in a position to complain." Lyon v. The Rockford & Blue Island R. R. Co. 167 Ill. 527, 530. By this we do not intimate that the remark complained of might have furnished cause for reversal in the absence of the provocation furnished by counsel for the defendant. Of course, a remark of the kind complained of should not be made. The jury should never be given any intimation, to the effect that the defendant, if held liable, may have an action over against some third party. But, even where such a remark is made, a verdict for the plaintiff will not be disturbed if it appears from the record that the plaintiff was clearly entitled to a verdict and that the damages were not excessive in view of the injuries complained of. El Dorado Coal and Coke Co. v. Swan, 227 Ill. 586; Parker v. Chicago City Ry. Co., 204 Ill. App. 9.

We find no error in the record and therefore the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

the plaintiff [illegible] objection to this line of argument, the court overruling the objections and permitting the report to be produced. In our opinion, the objections of the plaintiff's counsel should have been sustained. As to the issue of plaintiff's negligence which Illinois, in its dissenting opinion, cited the defendants for cases on which for reversal of the judgment, it is sufficient to say, as this court said in Dunham v. Illinois Cent. Co., 119 Ill. App. 188: "Plaintiff's counsel contends in some fashion the admission for the purpose which Illinois and Ill. Cent. Co. is guilty of negligence by omission." Also v. The Pullman Co. v. Ill. Cent. 147 Ill. 547, 550. By this we do not intimate that the remarks complained of might have furnished cause for reversal in the absence of the prejudicial testimony by counsel for the plaintiff. If further, a remark of the trial magistrate of counsel its be made. The jury should never be given the impression, by the effort that the defendant, if held liable, may have to satisfy any judgment the court gives. Not, even when such a remark is made, a reason for the plaintiff will not be sufficient if it appears from the record that the plaintiff was clearly and [illegible] to a verdict and that the damages were not excessive in view of the injuries sustained. Pullman Co. v. Ill. Cent. 147 Ill. 550; Illinois v. Dunham Co., 119 Ill. App. 9.

We find no error in the record and therefore the judgment of the Appellate Court is affirmed.

Affirmed.

Mr. Justice McBride, dissenting.

339 - 27623

Opinion filed May 9, 1935.

LOUIS NAPTHAL,

Appellee,

v.

REPUBLIC CASUALTY COMPANY,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant, Republic Casualty Company, seeks to reverse a judgment for $2,233.33, recovered in the Circuit Court of Cook County by the plaintiff, Napthal, in a suit brought by the latter, to recover his loss under a policy of burglary insurance.

In support of its appeal the defendant contends that certain statements appearing in the policy, and signed by the plaintiff, are warranties and that as such they must have been strictly true in order to place the plaintiff in a position to recover on the policy, whereas, in fact, certain of these statements were not strictly true. The plaintiff contends on the contrary that these statements weremot a part of the policy and that they, therefore, should be considered merely as representations and that, considered as such, the answers are sufficient to enable him to recover his loss under the policy, and he further contends that even if the answers be considered as warranties, the facts in evidence are not such as to show that they were not true.

In our opinion, the statements in question must be

considered as warranties and not as representations. As they appear in the record they are a part of the policy itself. It is not shown that they were made in connection with the application for the insurance, but they are incorporated in and made a part of the policy proper. As shown in the record, the policy is the usual form of burglary policy. It is apparent from an examination of the policy that the same general form was used on various sorts of burglary risks, and that as a part of each of the policies issued, there was attached to the general form at the proper place, a special form to make the general form fit the exact type of risk which the policy was designated to cover. Following the general form of agreement, on the part of the defendant to insure the plaintiff for the term set forth in the policy, there is a recitation in the general form, to the effect that the policy is "subject to the following agreements which are to be construed co-ordinately as conditions." At this point in the policy is a space, at the top of which appear the words: "Attach form here." Immediately under these words there is pasted on the policy what has been referred to as the special form, which is headed: "MERCANTILE (Open stock)". Immediately following this special form is another part of the policy consisting of 19 paragraphs, which are headed: "AGREEMENTS". The statements which we hold to be warranties appear on the reverse side of the special form, applicable to a mercantile, open stock risk. Just previous to these statements in question appears the following: "The following warranties, numbered 1 to 14 inclusive, are hereby made a part of this contract and are acknowledged and warranted by the assured to be true upon the acceptance of this policy." Following this paragraph appears the word, "WARRANTIES"; and following that word appear the statements, some of which the de-

fendant urges were not true.

But, we are further of the opinion that even though they be considered as warranties, none of them can be held to be such as to defeat this action on the policy. The first statement which the defendant calls in question, is the following: "The assured has never suffered loss by burglary, either at the premises above described or elsewhere, nor received indemnity therefor, except as herein stated. February 25, 1919 - $1980.00 Travelers." It appears from the testimony of the plaintiff that he had a burglary loss at the time stated, in connection with which he received a settlement of the amount stated, and that this loss was paid by the Employers' Liability Assurance Corporation. Such a situation as that will not defeat the policy on the evidence before us in this record. So far as the evidence shows, it was true that the assured had never suffered a previous loss by burglary except on the occasion which he gives, at which time he was paid an indemnity of the amount, indicated by the Employers Liability Assurance Company. If we are to give this policy the strict literal construction for which the defendant is contending, we would be obliged to say that as it appears in this statement, the last word "Travelers" means nothing at all. There is nothing in the record on the question.

Another statement called in question by the defendant is to the following effect: "The premises occupied solely by the Assured and insured hereunder are second floor." Immediately under the space in which the typewritten words "second floor" appear, are the printed words "(state exactly what portion of the building is so occupied.)" The evidence showed that the plaintiff occupied the second floor in the building designated in this

list of warranties. The evidence further showed that after the policy was issued and about a month prior to the burglary in question, the plaintiff permitted two of his friends, who were in business under the name of Ward & Seigel, to use four or five shelves in the premises in question, as a place to put their samples. It appears that they handled what are described as firemen's supplies. They went about daily, soliciting sales from members of the City Fire Department, coming to the plaintiff's place of business in the morning and getting their samples, and returning them to the plaintiff's place of business before he closed up for the day. It also appears that they solicited sales of women's apparel, for use in the fireman's families, and to fill all such orders they made their purchase from the plaintiff. They paid nothing to the plaintiff for the accommodation he afforded them, in the way of rent, and they had no key to the premises of the plaintiff. In our opinion the premises continued to be occupied solely by the plaintiff, notwithstanding the accommodation he afforded his friends.

Two other statements contained in the list of warranties as they appear in the policy are urged by the defendant as furnishing a basis for avoiding the policy. One of these statements is to the effect that "the business carried on by the assured in the premises is Ladies Waists." The other statement reads as follows: "Description of merchandise insured hereunder is Ladies Waists, including material for manufacturing same." Immediately below the space in which are written the typerritten words: "Ladies Waists, including material for manufacturing same," appear the printed words "(Describe fully)". It appears from the evidence that the plaintiff's place of business was on the second floor at 1259 South Halsted street in the City of Chicago, and that it

was known as the "Halsted Waist Shop." The plaintiff testified that nine tenths of his business was wholesale and that the biggest part of his stock was waists, but that he also carried some coats, skirts, capes, and sweaters. It is contended that inasmuch as the full description of the merchandise carried by the plaintiff includes articles other than waists, the above statements given by the plaintiff cannot be considered as strictly true, and for that reason the plaintiff cannot recover. The last statement in the list of warranties is to the effect that the insurance under this policy shall attach to "general stock described under" the latter of the two statements last above referred to. It appears further from the evidence that before this policy was delivered to the plaintiff, an inspector for the defendant company visited the plaintiff's place of business "to inspect the place." In our opinion a policy issued on the general stock of Ladies Waists, may not be defeated on an alleged breach of warranty when the warranty was to the effect, as we think it should be considered in this case, that the plaintiff was carrying a general stock of ladies waists, when the evidence shows that this was the fact, but that he also carried a small quantity of other articles of women's wear, such as those above referred to.

The defendant further urges that the trial court erred in connection with the admission of evidence on the question of damages; that it is an elemental rule that the best evidence must be produced, and that the evidence which the plaintiff submitted in proving his damages was not the best evidence. It is shown by the evidence in the record that the plaintiff contemplated taking a partner into the business, and that in that connection he had occasion to take an inventory of all the stock in his place

non known as the "failure duty rule." The plaintiff testified that nine tenths of the business was exclusively one that the bigness part of his stock was safe, but that he also needed some cash, either, cash, or securities. It is contended that inasmuch as the full acceptance of the promissory notice by the plaintiff indicates either that cash, the same consideration given by the plaintiff cannot be maintained as right. By that, not for that reason the plaintiff should prevail. The last statement in the list of warranties is to the effect that the insurance money into which shall return in "proper" which accounting under the terms of the promissory note upon the terms. It clearly follows that the evidence that before this policy was delivered to the plaintiff, sufficiency for the business standing within the discretion of business "to insure the place." In our opinion a policy issued on the possessed stock of [illegible] value, may not be defeated on an alleged breach of warranty when the warranty was in the effect, as we think it should be considered in this case, that the plaintiff was carrying a general stock of [illegible] value, when the evidence shows that also on the [illegible], but that he also carried a small quantity of other articles of [illegible] kind, such as those above referred to.

The defendant further argues that the trial court erred in responding with the instructions of counsel to the question of damage; that it is an elements only that the [illegible] be produced, and that the evidence which the plaintiff undertook to produce, was that the evidence which the plaintiff undertook to produce in damages was not the best evidence. It is shown by the evidence in the record that the plaintiff continued taking a [illegible] into the business, and that in that connection he has accounts in his [illegible] of all the stock in his place

of business. He took that inventory on the Sunday prior to the loss involved in this case. He introduced that original inventory. He then testified that he kept an accurate record of all merchandise sold and taken out of his place of business after that Sunday and prior to the loss. The original record of the articles involved in these sales were contained on a series of cards which were introduced in evidence, over defendant's objection on the ground that no proper foundation had been laid for their introduction in evidence. In our opinion, these cards were not subject to that objection. The plaintiff then offered in evidence an original pencil list of articles he claimed to have been stolen on the occasion of the loss in question. The defendant objected to the introduction of this list in evidence, stating that it was a conclusion of the witness and not the best evidence, in that it was taken from certain other data. In our opinion, these objections were not well founded. Where a loss occurs, such as the one involved here, which concerns a large number of articles which have been carried in stock, necessarily, the missing articles must be ascertained in some such manner as they apparently were in this instance. The articles included in the inventory list taken on the Sunday prior to the loss under the circumstances above mentioned, less the subsequent sales and such articles as may have been found on the premises after the burglary, would represent the articles which were lost. The list representing the stolen articles is, of course, a computation based on the other lists, but that does not make it a conclusion, nor can it be said to be admissible because it is based on the other data referred to. In connection with his objection to this last list counsel also observed "It is not complying with the contract, the policy contract that is in evidence." In our opinion that objection was not sufficiently specific to save the point which the

defendant now seeks to urge as a basis for the contention that the trial court erred in admitting the statement or list in evidence.

The remaining points urged by the defendant in support of its appeal, have to do with the instructions, in the matter of damages. The court gave only one instruction submitted by the plaintiff, and in the course of that instruction the jury were told that in estimating the amount of the plaintiff's damages, they might take into consideration the fair cash market value of the property taken from the plaintiff's premises, if they believed from the evidence it was so taken, within the provisions of the policy. The defendant contends that this instruction left the jury free to give such damages as they might feel the plaintiff ought to have, without any guidance as to the claims in the declaration or the restrictions of the policy. The jury were distinctly told in this instruction that they might consider the facts referred to, in estimating the plaintiff's damages, "if you believe from the evidence that the plaintiff is entitled to recover in this action," and further that "plaintiff is not in any event entitled to recover more than the indemnity provided in the policy." On this point the defendant further contends that if liable at all, it is only liable for the value of what it undertook to insure. We have already noted the fact that the plaintiff was permitted to submit his itemized statement of articles alleged to have been stolen, with their values, without any specific objections on the part of the defendant to the effect that this list contained any articles not covered by the policy.

The court gave the jury eighteen instructions submitted by the defendant, but refused to give the instruction marked 19 and it urged that in this respect the court erred. This refused

instruction was one which stated that if the jury believed from the evidence that the plaintiff warranted that the premises occupied by him, and insured under the policy, were to be occupied solely by him, but that the premises had other occupants during the term of the policy, and before and at the time of the alleged loss, then the plaintiff could not recover. In our opinion, this instruction was properly refused. As already stated, we are of the opinion that under the facts disclosed by the evidence in this record, it cannot reasonably be said that the plaintiff was not the sole occupant of the premises at the time he claims he suffered the loss which is the basis of this action.

The instruction, therefore, had no proper application to the facts in evidence.

We find no reversible error in the record and, therefore, the judgment of the Circuit Court is affirmed.

Affirmed.

TAYLOR AND O'CONNOR, JJ. CONCUR.

[illegible] was not quite aware that it was just twelve [illegible] the evidence that the plaintiff accepted just the premises occupied by him, not insured under the policy, were to be covered solely by him, but that the premises had other insurance under the terms of the policy, and notice and proofs of loss of the insured loss, then the plaintiff could not recover. In his evidence, plaintiff [illegible] was [illegible] [illegible]. As already stated, he was of the opinion that under the facts disclosed by the evidence above in this record, it cannot reasonably be said that the plaintiff was not the sole owner of the premises at the time he claimed he sustained the loss and is the real party in interest.

The [illegible], in my opinion qualifies [illegible] in question.

The [illegible] in the record and, therefore, the judgment of the [illegible] court is affirmed.

[illegible] and [illegible], JJ. concur.

130 - 27604 Opinion filed May 9, 1923.

MORRIS R. BALCH, Appellee, v. B. A. APELAND, doing business as Woodlawn Motor Car Sales and Service, Appellant.	APPEAL FROM COUNTY COURT, COOK COUNTY.

230 I.A. 645

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $860.00 claimed to have been paid by him while a minor on account of two automobiles which he had purchased from the defendant, he having disaffirmed the agreement after he became 21 years of age. There was a verdict and judgment in his favor for the amount of his claim, and this appeal followed.

The evidence shows that the defendant was in business in Chicago selling automobiles; that occasionally in the sale of new automobiles he would accept used cars as part payment; that on November 20, 1919, plaintiff, who was then 19 years and 11 months old saw a Buick automobile in defendant's place of business and on that day he purchased the car from the defendant for $1380.00, the $80.00 being for extras, interest and insurance. The contract of purchase was in writing and provided that $600.00 should be paid before the car was delivered, and the balance, $780.00, should be evidenced by ten notes. Plaintiff paid $10.00 in cash and two days later made another payment of $85.00. The contract does not specify when the payments were to be made.

The evidence further shows that shortly after making the contract to purchase the Buick, plaintiff who had been living with his parents in Chicago, went to Detroit where he was employed by street car and automobile companies, and from time to time sent payments to the defendant on account of the car. On June 8, 1920, he had paid $515.00. On July 22, following plaintiff went to defendant's place of business and paid $185.00, making a total of $700.00 and $100.00 more than he was required to pay before the car was to be delivered. After making this last payment Balch demanded the Buick car and was then told for the first time by the defendant that the defendant did not have it and, therefore, could not make delivery. As to what took place on the occasion of this payment and plaintiff's demand for the car, the evidence is conflicting. Plaintiff testified that after making the payment he demanded the car and was advised by the defendant that prior to that time the car had been disposed of, and that defendant suggested that plaintiff select another car, suggesting a Cole and a Paige which the defendant then had in his possession. The defendant testified that after the receipt of the $185.00 and the demand by plaintiff for the car he advised the plaintiff that he had disposed of the Buick prior to that time and that he thereupon asked the plaintiff if he wanted his money returned or if he wanted to select another car.

The evidence further shows that plaintiff thereupon tried the Cole and found it unsatisfactory, and that he then tried out the Paige, which seems to have satisfied him, and that four days afterward, on July 26, 1920, he bought the Paige and was given credit for the $700.00 which he had paid. He executed notes for the balance of the purchase price, aggregating $1173.50

secured by a chattel mortgage. The purchase price of the Paige was $1800.00. Thereupon the car was delivered to the plaintiff. The notes were due monthly beginning August 27, 1920, and were for $146.68 each. Plaintiff took the car and returned to Detroit where he was working. He did not pay the August note when it came due. Shortly before the September note fell due he returned to Chicago. The defendant saw the automobile standing a short distance from his place of business where it had been left for a few moments in the street by the plaintiff, and took it to his place of business. About half an hour afterwards when plaintiff discovered that the car was gone and that defendant had taken it, he called on the defendant but the latter refused to give him the car because the August note was not paid. Negotiations were had between the parties and plaintiff endeavored to re-possess himself of the car until October 5 when a new agreement in writing was entered into whereby the defendant resold the Paige car to the plaintiff for $1186.35, to be paid at the rate of $75.00 per month, which seems to have been the balance due on the original purchase of the car, in addition to some interest and expenses. The written agreement entered into on that day further provided that notes for the $1186.35 should be made by the plaintiff and secured by a mortgage which should be dated October 6, 1920, the first of which notes should become due November 6, 1920. Both notes and mortgage were to be signed before the car would be delivered to the plaintiff. It further provided that until the car was delivered plaintiff should pay a storage charge of $5.00 per month, which together with the $75.00 on account of the purchase price, would make a total of $80.00 plaintiff was required to pay each month. On November 22 plaintiff paid $80.00, and claims to have made another payment of $80.00 on December 7, while the defendant con-

tends that this last payment was not made until December 21. Plaintiff became 21 years of age on December 11, 1920.

The position of the defendant on the trial was that this last payment having been made on December 21, after plaintiff became of age, the contract was thereby ratified and became binding. The plaintiff's position was that this payment being made December 7, four days before he attained his majority, and since he disaffirmed the contract and demanded his money back on December 21, and again on December 31, he was entitled to recover. Whether the notes and mortgage mentioned in the agreement of October 5, 1920, were ever made out does not appear, but it is undisputed that they were never executed by the plaintiff.

In addition to the general verdict returned by the jury in which they found for the plaintiff assessing his damages at $860.00, at the request of the defendant the court submitted a special interrogatory as follows: "Did the plaintiff in this case pay to the defendant in this case the sum of Eighty Dollars ($80.00) on account of the automobile in question after the plaintiff became of age?" which the jury answered in the negative.

It is the contention of the defendant thatthe answer of the jury to this special interrogatory and the general verdict are against the manifest weight of the evidence. A further contention is that the trial court erred in refusing to strike out an answer of the defendant made to a question put to him on cross-examination as to the transaction between the parties. He was asked: "Have you got that Paige car now?" Counsel for the defendant: "Objected to." "A. No." "Q. You sold it?" To the latter question objection of counsel for the defendant was sus-

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tained. Thereupon counsel for the defendant moved to strike out the question as to whether defendant then had the Paige car and the answer made to that question, which motion was overruled. It is in respect to this ruling that the defendant claims he was prejudiced.

It is the law that if plaintiff made a payment on account of the automobile after he reached the age of 21 years, the contract would be binding and could not be disaffirmed by him. Rubin v. Strandberg, 212 Ill. App. 327, affd. 288 Ill. 64.

1. Is the verdict that the last payment of $80.00 was made December 7, 1920, against the manifest weight of the evidence? Plaintiff testified that he had been working for the New York Central Railroad and at the post office prior to making the last payment; that on the evening of December 7 he and two other young men, Lyons and Stanley, went to defendant's place of business for the purpose of making a payment; that he went into the defendant's private office and there paid him $80.00 and received a receipt for it; that he received receipts for the other payments but that he lost all of them. He further testified that at that time he told the defendant he did not think he could keep up the payments; that the defendant replied that plaintiff was getting along pretty well, and asked plaintiff when he would become of age and that the latter replied December 11; that the defendant then stated that the signing of the notes could be deferred until the next payment. Plaintiff further testified that shortly before Christmas he again called on the defendant at his place of business and demanded the return of his money. Lyons testified that on December 7 he and Stanley went with plaintiff to defendant's place of business; that he did not see the payment made because plaintiff and defendant

were in another office. It is admitted that no one but the plaintiff and defendant were actually present when the money was paid. Stanley had left the city before the trial and could not be located. The defendant testified that no payment was made on December 7, but that the last payment was made on December 21; that he was in his private office on that day when plaintiff came in, and that several men were in an outside office; that the payment was made incurrency and that he gave plaintiff a receipt for it; that he fixed the date as December 21 because he had been making a doll house in the basement as a Christmas present for his little girl when someone called and said that the plaintiff was there to make a payment; that in response he came upstairs and plaintiff gave him $90.00; that he gave the money to a Mr. Marquart, who was in defendant's employ, and the latter put the money in the safe. Marquart testified that he was in defendant's employ and that the plaintiff and other young men called in the evening of December 21 at defendant's place of business; that when they called the witness notified the defendant who was working on a doll house in the basement, and the latter came up and plaintiff and defendant went into the private office; that before plaintiff went into the private office the witness saw him show a roll of bills to a Mr. Cleve who was present, and that plaintiff then stated he was going to make a payment on his car; that later defendant gave the money to the witness and the latter put it in the cash drawer with a memorandum, and the next morning the bookkeeper, Miss Linden, took the money to the bank for deposit.

Cleve testified that he knew both plaintiff and defendant and that he saw plaintiff in the month of December, 1920, the exact date he could not give, but that it was just before Christmas; that Marquart and some other men were there; that he talked

with plaintiff and that plaintiff exhibited a handful of currency, and stated he wanted to take the car out if he could so arrange with the defendant. Edith Linden testified that she was the bookkeeper for the defendant. She exhibited her books which showed that she had received the $80.00 together with some other money on December 22, and deposited it the next day in the bank. The books, together with the bank deposit book, were also offered and received in evidence. Plaintiff testified that Marquart was not present at the time he paid the money, nor was Cleve there, but he said he saw the latter there the time he called to demand his money back shortly before Christmas; that at that time he did not show Cleve a roll of bills, but that he had a hole in his pocket and the money dropped out on the floor. This is substantially all the direct evidence in reference to the question as to when the last payment was made. But all the evidence must be considered as tending to throw light on the credibility of the several witnesses, and particularly the plaintiff and defendant.

On July 26, 1920, at the request of the defendant, plaintiff signed a paper whereby he certified before a notary public that he was over 21 years of age. Both parties refer to this document as an affidavit, but it is not. Plaintiff admitted that at that time he told the defendant he was more than 21 years old. He further testified that on October 5 when the transaction in question was made he told the defendant he was not 21 years of age, and for that reason the notes and mortgage were not signed; that on December 7 he again told the defendant he was not 21 years old.

There is a great deal in plaintiff's testimony that would indicate that he was not telling the truth. On the

with plaintiff and they visited defendant requesting a loan of some money, and stated he wanted to take the car out if he could so arrange with the defendant. Smith Hansen testified that she and his brother-in-law met the defendant. She testified that books which showed that she had received the $300.00 together with some other money on December 22, and deposited it the same day in the bank. The books, together with the bank deposit book, were also offered and received in evidence. Plaintiff testified that defendant was not present at the time he paid the money, but that Clara Foote was, and he said he put the latter there the time he called to [illegible] the money shortly before Christmas; that at that time he did not give Clara a roll of bills, but that he had a hole in his pocket and the money dropped out on the floor. This is substantially all the direct evidence in reference to the question as to when the last payment was made. But all the evidence must be considered as tending to throw light on the credibility of the several witnesses, and particularly the plaintiff and defendant.

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There is a great deal in plaintiff's testimony that would indicate that he was not telling the truth. On the

other hand the defendant's conduct in the transaction of his business, as testified to by himself, clearly shows that his method of doing business in the instant case was not all that it should be. He sold the Buick to plaintiff in November, 1919, receiving but $10.00 in cash, although he received $35.00 more within a few days thereafter. The written contract then entered into provides that when $600.00 was paid the car would be delivered. The time when these payments were to be made does not appear. It further appears that on June 8, 1920, plaintiff had then paid $515.00; that on July 22 he personally called and paid $185.00 more, which made his total payments $700.00. He was then entitled to the car. After making this payment plaintiff demanded the car, as was his right, and thereupon he was notified for the first time by the defendant that defendant did not have the car; that sometime prior to that time the owner of the car, who had left it with defendant for sale, came and took it away because the payments were not coming in fast enough. Defendant testified that he then offered to return to plaintiff his money. Of course, this is unbelievable because the defendant had just received the $185.00. If he wanted to return the money as he testified, why did he not offer to do so before receiving this payment. It is perfectly apparent that he was taking advantage of the young man. When he had $700.00 of plaintiff's money he induced him to take an $1800.00 car, and for the first time demanded a statement in writing from plaintiff as to his age. Here the defendant by his own testimony admits that having sold the Buick car and having received payments from time to time, he deliberately and without any authority disposed of it otherwise. Again, when he took possession of the Paige car in September, 1920, without any apparent authority, although

both parties speak of a foreclosure of a chattel mortgage, he compelled the plaintiff, as he says, to buy the car, adding additional expense to the remainder due. This car then belonged to the plaintiff but was not to be delivered until some time later. But regardless of the legal rights of the parties the defendant testified that he had disposed of the car. This is the evidence that the defendant claims was objectionable. He answered the question, although his counsel had objected, before the court could rule. However, we think it was competent because it might tend to show that plaintiff had therefore rescinded the contract. This would give the defendant the right to dispose of the car.

Upon a consideration of the entire evidence, and considering the method in which the defendant carried on the transaction throughout, we think it is not strange that the jury did not give much credence to his testimony. We certainly wouldnot be warranted in finding that the jury's verdict was against the manifest weight of the evidence. They were in a much better position, as was the trial judge, to determine this question than we are. They saw and heard the witnesses on the stand and upon a consideration of the record we are unable to say that the finding of the jury is against the manifest weight of the evidence.

The judgment of the County Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

(31/60)

214 - 27690

Opinion filed May 9, 1923.

FRED A. LOHN, Appellee, v. J. A. FOBERG, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

200 I.A. 615

MR. JUSTICE O'CONNOR delivered the opinion of the court.

By this appeal defendant seeks to have reversed a judgment rendered against him and in favor of plaintiff for $1,000.00 in an action for personal injuries.

The record discloses that there is a double line of street cars operated in Irving Park Boulevard, an east and west street; that this street is intersected at right angles by Kedvale avenue, a north and south street; that near the southwest corner of the intersection there is a station of the Chicago & Northwestern Railway Company; that plaintiff was a police officer of the City of Chicago and on November 11, 1919, at about ten o'clock in the morning was riding on an eastbound car in Irving Park Boulevard. He was standing near the motorman in the front vestibule of the car and was on his way to the Northwestern station to take a train to his work downtown where he was employed as a mounted policeman. As he got off the street car for that purpose the defendant, who was driving his automobile east in Irving Park Boulevard and south of the street car track, struck plaintiff injuring him.

Plaintiff testified that the street car on which he was riding stopped at the west cross walk of Kedval avenue; that the motorman opened the door and plaintiff got off and walked in a southwesterly direction toward the entrance of the Northwestern station on Irving Park Boulevard where he intended to board a train; that when he was about midway of the street car, which remained standing, and about eight feet south of it, he first saw defendant's automobile coming toward him; that it was then but a few feet from him and he endeavored to avoid being struck but was unable to do so. Plaintiff further testified that as he got off the street car he looked to the west and could see in Irving Park Boulevard a distance of two blocks; that he did not see defendant's automobile nor any other traffic in the street until the automobile was just about to strike him.

The defendant's version of the matter, as testified to by himself, was that he was driving his automobile east in Irving Park Boulevard at about fifteen miles per hour; that he was in the roadway between the street car track and the south curb; that he was traveling a little faster than the street car, and when the street car was about two and one-half or three car lengths west of Kedvale avenue the automobile was just passing the rear end of the car; that at that time there was no slacking in the speed of the street car, and the defendant intended to pass it, but after it had run a length or two plaintiff suddenly jumped from the front end of the street car in the path of the automobile, and that it was impossible for the defendant to avoid striking plaintiff.

If this were all the evidence in the case, no recovery could be had, because if plaintiff's version of the matter, as

Suddenly horrified that the street car on which he was riding stopped at the same corner with it Tweed assumed that the motorman opened the door and instantly got off and walked in a nightmarishly irrelevant manner to a telephone at the Intersection waiting to inform the Inspector of the Intersection waiting to inform the Inspector which he intended to board a train that were in two minds about of the street car, which remained standing, and about what to do with it, he first saw Inspector's automobile coming toward him; but it was too late. The Inspector was on his way home to dinner. Tweed's fantasy vanished when he saw the car and the Inspector's automobile in the street and he ran toward the Inspector's automobile and the other traffic in the street until the automobile was just about to strike him.

The Inspector's training of the motor, as initiated by Donald, was such he was driving his automobile most in driving four miles a hour (fifteen miles per hour) and he was in the roadway between the street car track and the curb; then he was travelling a little faster than the street car, and when the driver of the car which had his one-half or third of Langley West of Dundas crossed the automobile was just passing the car and at the car; that is that the driver was no standing in the middle of the street car, and the Inspector intended to pass it, but after it had run a length or two Donald suddenly jumped from his front seat of the street car in the path of the automobile, and that it was impossible for the motorist to avoid striking plaintiff.

If this were all the evidence in the case, the verdict would be bad, however if plaintiff's version of the matter, as

testified to by himself, were true, he was clearly guilty of contributory negligence, because there was nothing to obstruct his view of the approaching automobile. There was no other traffic in the street and the fact that he testified that he looked but did not see the automobile cannot be true, inasmuch as his eyesight was good. If the defendant's version is true, as testified to by him, it is quite obvious that no recovery could be had. But there is other evidence in the record, which we will not discuss since we have reached the conclusion that there must be a new trial.

After the accident plaintiff was removed from under defendant's automobile and assisted into it. He was then taken by the defendant and some other persons to the Ravenswood Hospital where he received surgical and medical attention. While his injuries were there being treated, another police officer, John Nape, called at the hospital in the line of his official duties to inquire into the cause of the accident and to make a report. On cross-examination plaintiff denied that he told Nape at that time that he opened the door and got off the car in a hurry. He was asked this question: "And you didn't make any complaint about Foberg at that time - did you?" To this question an objection was sustained.

Afterwards when plaintiff's case was finished the defendant called Nape as a witness and he testified that the police station out of which he was working was informed of the accident and he went to the Ravenswood Hospital; that he there saw the plaintiff and defendant and that plaintiff told the witness that he had stepped or jumped from the car in front of the automobile, and that the accident was his fault and not

Analized in its totality, even then, he was already quite
of analytically multicausal theorist. Here we utilize in ab-
stract its view of the nineteenth-century naturalism. There was an
alpha-hatred in the wheels and the Tael-fire in Vanished
Lad; he insist but its not as the economists assert to area,
Imagine as his epitaphs and gain. If the [illegible] ex-
ecute it time, he imagined to be one, it is to point adjuncs that
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sphere, which is all its dynamic study of both tracing the ex-
planing that theory does of a new vision.

After his published priority was written for under
Malinowski's orthodoxies contrast lens is. He was been
lured by the determinist and some other questions to the Durkheim-
ward Elucidis which in historical analysis and sociical criticism.
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effect. Then then, outline; as the inserted in the time of his
efficacy making to explore into the [illegible] of the analysis and
is such a repeat. The structure-functioning identity during that
he said that it did [illegible] that is [illegible] the [illegible] and [illegible] of
the [illegible] theory. In his notes [illegible]-[illegible]. That are
Alex's [illegible] and [illegible] [illegible] [illegible] [illegible] - [illegible] [illegible]
In this [illegible] or [illegible] [illegible] [illegible].

Although when [illegible]'s case [illegible] [illegible]
Malinowski [illegible] [illegible] a [illegible] and to [illegible] [illegible] [illegible]
Police [illegible] [illegible] of [illegible] [illegible] [illegible] [illegible] [illegible] of the
[illegible] and [illegible] with it the [illegible] [illegible]; [illegible] [illegible] [illegible]
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[illegible] that [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]
the [illegible], [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

defendant's. He was not asked and he did not state whether defendant overheard this conversation.

After the defendant closed his case the plaintiff testified in rebuttal that he never saw Nape at the hospital at all and that he made no such statement as Nape testified about, to anyone. After all the rebuttal evidence was in the defendant was called in sur-rebuttal and he testified that he saw Nape at the hospital shortly after plaintiff was taken there. He further testified that he overheard the conversation between plaintiff and Nape. He was asked to state what the conversation was but the court sustained an objection.

We think the court should not have sustained objections to the questions put to the plaintiff on cross-examination, above mentioned, and we also think the court should have permitted the defendant to state the conversation that he overheard between plaintiff and Nape at the hospital. This testimony, if admitted, might have assisted the jury materially in arriving at a correct verdict.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P. J. AND TAYLOR, J. CONCUR.

27727

251 - 27727

Opinion filed May 9, 1923.

BENJAMIN F. TURNER,
Appellee,

v.

HENRY M. HEDBERG, et al
On appeal of Henry M. Hedberg,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover $3150.00 claimed to be due him for obtaining purchaser for the building known as the Wrightwood Apartment Hotel for the defendants, who were real estate brokers and who had the exclusive agency for the sale or renting of the property. There was a verdict and judgment in plaintiff's favor for the amount of his claim and this appeal followed.

It appears from the record that plaintiff was a broker in the real estate business in Chicago, and that defendants were also engaged in the same business; that the defendants had the exclusive agency for the sale or renting of the Wrightwood Apartment Hotel; that sometime in June, 1918, the plaintiff having a prospective purchaser or tenant, called on the owner of the premises, one Carson, who advised plaintiff that the defendants had the exclusive agency for the property. Thereupon plaintiff called on defendants and advised them that he had a prospective customer, and it was orally agreed between the parties that if the property was sold or rented to plaintiff's customer, the defendants would divide the commission. Afterwards,

plaintiff's customers, John L. Meigs, and Frank S. Fitzgibbon looked over the premises, and the matter was then taken up with defendants and negotiations followed. On August 20, 1918, the property was conveyed to Fitzgibbon, the consideration mentioned being $10,000.00 although the deed bore revenue stamps in the sum of $292.50, from which it seems to be conceded that the real consideration was $292,500.00. On the same day Fitzgibbon executed a trust deed on the property to secure a part of the purchase money, and on August 28, 1918, he executed a lease on the hotel and furnishings to Meigs. This lease was assigned by Meigs on November 29, 1918, to the Shore Crest Hotel Company, a corporation of which Meigs was president and Fitzgibbon manager. Meigs took possession of the hotel and operated it for some time. At the time of the trial, which was begun December 6, 1921, the Shore Crest Company was still in possession under the lease. The evidence further shows that on January 16, 1919, Fitzgibbon gave a quit claim deed to the premises inquestion to Frank C. Kathje. The evidence further shows that the defendants in payment of their commission received from Carson, the owner, $3800.00 in cash and a note for $2500.00 signed by Meigs and his brother. It further appears that a few days after the defendants received the $2500.00 note they turned it over to Frank C. Kathje, who was the attorney for the defendants as well as the owner in the transaction and apparently represented all parties.

An examination of the record, as well as the brief and argument filed by the defendants, discloses the fact that the defense made in the trial court and the argument made in this court is confused, uncertain and obscure.

1. One of the points made by defendants here, as stated by their counsel, is: "No evidence whatever was introduced or

plaintiff's mortgagee, John L. Hodge, and found in favor of defendants and counterclaimants (Tr.[illegible]). On August 20, 1[illegible], the property was conveyed to Tillinghast, the counterclaimant-mortgagee being $[illegible],[illegible] although the land here involved was subject to the mortgage of $[illegible],[illegible]. From which it seems to be recorded that the real consideration was $[illegible],[illegible]. On the same day Tillinghast conveyed a large tract of the property to Augusta a part of the property, and on August [illegible], 1[illegible], he mortgaged a large [illegible] and "[illegible]" to Hodge. This large [illegible] by deed on November [illegible], 1[illegible], to the Great [illegible] Company, a corporation of which Hodge was president and Tillinghast secretary. Hodge was prominent at the trial and impressed it his own [illegible]. At the time of the trial, which took place December [illegible], 1[illegible], the Great [illegible] Company was still in existence with its [illegible]. The [illegible] Tarbox [illegible] January [illegible], 1[illegible], Tillinghast was a quite alone and in the [illegible] to [illegible] it. [illegible]. The [illegible] Tarbox alone had the [illegible] to [illegible] of [illegible] mortgagee [illegible] the [illegible], the [illegible], [illegible] [illegible] and a note for $[illegible] signed by [illegible] and his [illegible]. It further appears that a few days after the [illegible] [illegible] the $[illegible] note was signed it was over to Frank C. Hodge, who was the attorney for the defendants as well as the owner in the foreclosure and apparently represented all parties.

An examination of the record, as well as the trial court's opinion filed by the defendants, discloses the fact that the defense made in the trial court and the judgment rose in this court is material, controlling and important.

I. One of the points made by defendants here, as stated by their counsel, is: "The evidence adduced was introduced or

heard in support of the plaintiff's claim that he procured Meigs or Fitzgibbon as a purchaser or lessee of the premises in question." This is expressly contrary to the facts as stipulated at the trial by the parties. It was stipulated that the owner transferred the property to Fitzgibbon by deed, and that Fitzgibbon executed a trustdeed upon it for a part of the purchase money; that he then leased the hotel and furnishings to Meigs; that Meigs went into possession and later assigned the lease to the Shore Crest Hotel Company, a corporation of which Meigs was president and Fitzgibbon the manager, and that the Shore Crest Company took possession and operated the hotel and it is undisputed that plaintiff procured Meigs and Fitzgibbon. So that it appears that the point made as stated is directly contrary to the facts as stipulated by the parties on the trial. But as we understand it defendants' argument is that neither Fitzgibbon or Meigs furnished the purchase money. This, of course, is immaterial and the jury were so instructed by the trial judge. So far as the record discloses it was no concern of the defendants where the money came from since the transfer was actually made to the customers furnished by the plaintiff. In this connection the defendants sought to prove that the property was sold to one Cameron. This, of course, was directly contrary to the deed and other documents in evidence, and was, therefore, not admissible.

2. The defendants further argue that the judgment is wrong because in no event should the $2500.00 note be considered as commission received by the defendants since the evidence shows that the note was not paid. That note was given to the defendants as part of their commission. Why they later returned it to their attorney does not appear. In these circumstances we think the

defendants ought not now be heard to say that this note was not to be considered as commission. Moreover, there was no such point made on the trial. The court instructed the jury that if they believed from the evidence that there was an agreement between the parties to divide the commissions and that the property was sold to plaintiff's customer and the defendants received a commission, then the plaintiff was entitled to recover one-half of it. The undisputed evidence in this respect was that $3300.00 of the commission was paid in cash and $2500.00 by Meigs' note. And although counsel for the defendants made a number of objections to the charge of the court to the jury, yet no point was made that the note should not be treated as a part of the commission. Having permitted the case to be tried on the theory that the note was the same as cash, defendants will not now be permitted to shift their position in this court and urge the contention they now make.

3. A further point is made that the judgment is wrong and should be reversed because the uncontradicted evidence shows that plaintiff was engaged in the real estate business in Chicago and that he had not obtained a real estate broker's license as required by the ordinance of the city. The defendants offered the ordinance in evidence but it was excluded by the court on the ground that plaintiff was not suing to recover a broker's commission for the sale of the property, but that he was suing on an express contract to recover for services rendered. We think the court was clearly right in this respect. While it is true that a real estate broker cannot maintain an action for commissions which he claims to have earned by selling a piece of real estate without having obtained a license in accordance with the ordinance, yet that ordinance has no application here. The broker's commission in this case was paid to defendants and plain-

tiff's suit is based on an oral agreement entered into with the defendants whereby they agreed to give him one-half of this amount. This contract is legal and binding and is in no way effected by the ordinance. This further appears from the ordinance in question, which defines a real estate broker as follows: "A real estate broker is one who is engaged for others in negotiating contracts relative to real estate." Plaintiff here did not negotiate a contract. That was done by the defendants. We have heretofore announced this same principle in the case of Gross v. Strauss, 208 Ill. App. 263.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

(C178A)

275 - 27751 Opinion filed May 9, 1923.

UNIVERSAL AUTOMOTIVE SUPPLY CO., a corporation, Appellee, v. CHARLES L. METTY, et al,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
On appeal of FRANK W. STEELE, Appellant.	

MR. JUSTICE O'CONNOR delivered the opinion of the court.

The Universal Automotive Supply Company brought an action of attachment against Charles L. Metty and Alana Metty claiming that they owed it $356.02. The writ was served on the defendants and Frank W. Steele, as garnishee. The defendants did not appear but were defaulted, and a judgment rendered against them for $356.02. The garnishee also failed to appear and a conditional judgment was entered against him for the same amount. A writ of scire facias issued and was served on the garnishee requiring him to appear and show cause why the conditional judgment should not be made final. He filed his answer setting up in substance that on September 2, 1921, he purchased personal property from the defendants for $700.00, which sum he paid them, and received a bill of sale for the property. The answer further set up that at the same time and place he also purchased for $2700.00 from the defendants a certain leasehold interest covering two stores and a garage and the good will of the garage business which had been conducted

by the defendants; that he retained out of the purchase price of $2700.00 the sum of $800.00 as a guarantee that the defendants would pay all the bills which they owed at the time of the sale of their property to Steele. The answer further alleged that afterwards Steele paid out of the $800.00 retained by him $250.00, which the defendant owed at the time of the sale, and further that the defendants in violation of the terms of the sale collected $63.05, which under the terms of the purchase, belonged to him. It was further averred in the answer that at the time of the sale of the property defendants represented to him that they did not owe in excess of $600.00 and that subsequently it appeared that at the time of the sale they owed in excess of $1200.00. The answer also alleged that defendants were husband and wife, residents of Illinois, and were entitled to $400.00 exemption out of the personal property which he had purchased from them for $700.00.

The court held this answer insufficient and entered judgment against the garnishee for $356.00, to reverse which the garnishee prosecutes this appeal.

It seems to be conceded by both parties that the sale of the property, leasehold and business by the defendants to the garnishee was in violation of the Bulk Sales Act of this State. But the garnishee contends that under the facts disclosed by his answer, which were admitted to be true, the defendants could not recover against him, and under the law plaintiff had no greater right than the defendants.

This court has repeatedly held that where property is sold in violation of the Bulk Sales Act garnishment will lie against the purchaser, the sale being fraudulent and void as to the defendants' creditors. Cohn v. Malo, 198 Ill. App. 538;

National Trust & Credit Co. v. Elmes, 207 Ill. App. 153; LaSalle Opera House Co. v. LaSalle Amusement Co., 212 Ill. App. 621; Superior Plating Works v. Art Metal Crafts Co., 218 Ill. App. 148; United Paper & Trading Co., Inc. v. Allen, 224 Ill. App. 261; Monski v. Smith, 224 Ill. App. 206.

These cases are authority for the judgment of the Municipal Court, and it is, therefore, affirmed.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

(3171)

86 - 27559

Opinion filed May 9, 1923.

ALVIN E. NELSON and EARLE S. NELSON, co-partners, doing business as NELSON BROTHERS,

Appellants,

v.

EDWARD F. JONES,

Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

230 I.A. 640

MR. JUSTICE TAYLOR delivered the opinion of the court.

On November 27, 1920, one Cunningham, a Ford Agent, in Evanston, sold through a salesman, Monahan, a Ford runabout to the defendant. The defendant paid down $342.50 and the balance, including certain extras, was financed by the defendant giving eleven notes of $56.00 each and two notes, one being for $54.00 and the other for $2.00, all of which were secured by a chattel mortgage to Nelson Brothers, the plaintiffs. At the time of the purchase the defendant went with Monahan to the office of the plaintiffs who were in the business of taking and discounting such notes, and they made out the notes and chattel mortgage which the defendant signed and then gave to Monahan a check for $559.00, the balance of the purchase price. At the time of that transaction the defendant says he was told by one of the Nelsons that the notes that were given would pay for fire and theft insurance. The insurance was to protect both the plaintiffs, the owner of the notes and the defendant. On the same date the defendant signed what is entitled a Purchaser's statement, in which he undertook to represent to the plaintiffs his financial responsibility and certain facts about himself. In that statement occurred the following: "Insurance - Kind Fire

Theft." The evidence shows that the Ford agent, the plaintiffs, of whom the defendant bought the automobile, had a method of doing business whereby they took a prospective customer to Nelson Brothers and got them to make a loan on the automobile of the balance of the purchase price, for which Nelson Brothers would take notes and a chattel mortgage, and then pay directly to the Ford agent the balance of the purchase price; the result being that, as far as the Ford agent was concerned, the automobile would be paid for in full, and the purchaser would owe his notes for the balance of the purchase price to Nelson Brothers, the plaintiffs. It seems to have been the practice of the plaintiffs when making such a loan to charge, in figuring up the amount for which the notes were to be made, a certain amount for insurance of the automobile against fire and theft. The defendant testified that at the time the insurance was discussed, when the notes and chattelmortgage were being made out in the plaintiff's place of business, one of the Nelsons said the insurance would be 90% of what he, the defendant was paying forthe automobile, and, further, that Nelson said that the $56.00 per month which the defendant was to pay would cover fire and theft insurance on the auotmobile and that he, the defendant, told Nelson that that would be all right and then signed the notes.

The evidence shows that the plaintiffs obtained a policy of insurance on the automobile in question for the sum of $725.00 from the Central Casualty Insurance Company; that it was dated November 17, 1920; that that insurance provided against loss by theft, etc. That policy, however, contained the following: "The underwriters shall not be liable while any automobile hereby covered is used, operated or maintained * * * (c) for rental, hire or livery or the transportation of passengers for hire." The policy was kept by the plaintiffs, as mortgagees. In the early part of

of 1921 the Central Casualty Insurance Company went into bankruptcy and the policy on the defendant's automobile, together with some hundreds of others, was on January 28, 1921, taken over at the instigation of the plaintiffs by the Equitable Casualty Underwriters for a pro rated charge of premium. On February 23, 1921, the agent of the latter company wrote to the plaintiffs that it had been "holding covered" a number of policies on various cars, including the defendants, since January 28, but were unable to write out the policies for lack of information, generally the name of the locking device, and that "coverage will cease" unless information is received by noon of February 28, 1921. On February 23, 1921, the automobile, while being driven, by an employee of the defendant, for hire, was taken from the driver by force and stolen, and on March 21, 1921, the Equitable Casualty Underwriters notified the defendant that the theft of his car was not covered under any policy issued by it and gave as the reason for the non-coverage that "the automobile was used for livery and taxicab purposes and such use of the automobile, is specifically excluded by the policy."

The plaintiffs having brought suit for the amount of the notes with interest and the defendant having made a claim for damages for a breach of contract to insure, the trial judge assessed the plaintiffs' damages at $873.00 and the defendant's damages at the sum of $715.50 and entered judgment for the difference, being the sum of $157.50, in favor of the defendant and against the plaintiffs.

The question arises whether the agreement between the plaintiffs and the defendant as to insurance covered the theft

of 1924 the Postal Telegraph Company sent into Washington and was acting in the defendant's interests, signing with was Secretary of Commerce, was on January 24, 1927, being was at the instigation of the plaintiffs by the Postal Telegraphy Commission for a new rate schedule of promulgation. On January 25, 1928, the agent of the Postal Telegraph wrote to the plaintiffs that it had been "holding negotiations" a number of months on various ones, including the defendants, since December 28, but were unable to write out the proposals for lack of time (Pleadings, particularly the case of the Postal Telegraph, and that "negotiations will cease" unless information is received by noon of February 28, 1928. On February 27, 1928, the plaintiffs, acting using orders, by an employee of the defendants, the rate, was below from the driver by phone and wires, and on March 21, 1928, the defendants denied by telegraphic notifies the defendant that the tariff of 1924 was not received which was acting law was "a fit and have no the proceedings for non-compliance that "the authorities was and the library and tariff purposes and each one of the defendants, is statutorily authorized by the public."

The plaintiffs before brought suit, for the amount of the notes with interest and the defendant having made a claim for damages for a breach of contract in counter, the trial judge answered the plaintiffs' demurrer at 1928,27 and the defendant's demurrer at the rate of 27%,27 not material judgment for the difference, being the sum of 1928,28, in favor of the defendant and against the plaintiffs.

The question arises whether the agreement between the plaintiffs and the defendant as to damages received the limit?

of the automobile, even though it was used for hire. If the plaintiffs, at the time the defendant borrowed the balance of the purchase price on his automobile and gave to them a chattel mortgage and notes, which latter included a premium for insurance, promised to have it insured against theft and made that promise without qualification and the defendant understood it in that way, and nothing was said about there being no insurance in case it was used for hire, then the obligation of the plaintiffs would be binding even though the automobile, was during the running of the insurance, stolen while being used for hire.

The defendant testified that he was not told at the time he borrowed the money from the plaintiffs anything about the insurance for theft not being good if the automobile was used for hire. He says that Nelson stated that he, the defendant, was to pay $56.00 per month and that that would cover fire and theft insurance, and that he, the defendant, then said, all right, and signed the notes; that Nelson said, that only pays for fire and theft insurance and you had better take out some insurance against accident.

Monahan, the salesman for Cunningham, testified that the plaintiffs were to furnish the insurance and that they were to hold the insurance policy as collateral until the last note was paid. He also says that the premium for insurance was included in the notes and that the defendant was told by Nelson that the notes were to cover fire and theft.

Both Cunningham and A. E. Nelson, one of the plaintiffs, the one who negotiated the loan to the defendant, testified that

nothing was said about the automobile being used as a taxicab, that is, for hire.

Nelson in his testimony does not state that the insurance did not cover the automobile if it was used for hire, that is, as a taxicab.

The evidence conclusively shows that the automobile was from time to time used for hire and was actually being used under a hiring at the time it was stolen.

We see no escape from the conclusion that - regardless of the fact that it was subsequently used for hire and that in the policy of the General Casualty Ins. Co. it was provided that there should be no liability in case the automobile was operated for hire, and that on January 28, 1921, the insurance of the Central Casualty Ins. Co. on the automobile in question was taken over by the Equitable Casualty Underwriters - the unqualified promise of the plaintiffs, when they charged the defendant for premium, that it would be insured against theft gave rise to a binding obligation.

The evidence shows that they made an unqualified promise, that the defendant so understood it, and that the defendant was charged a consideration. That made a binding contract.

The evidence shows that the plaintiffs in failing to insure it generally against theft, broke their contract.

From that, it follows that they are liable in damages to the defendant for $715.50, which is 90% of the list price, and as the defendant is indebted to the plaintiffs, as evidenced by his notes, in the sum of $558.00, the judgment of the trial

judge in favor of the defendant and against the plaintiffs for $157.50, the difference, was correct. The judgment will, therefore, be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

105 - 27579

Opinion filed May 9, 1923.

ARTHUR L. DORSEY,

Appellant,

v.

JOE MIHALIC,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On March 11, 1921, the plaintiff, Arthur L. Dorsey, brought suit in tort against the defendant, Joe Mihalic, claiming that the latter struck, assaulted and injured him. The defendant filed an affidavit of merits denying the assault and consequent injury and set up "that if he did strike the plaintiff he did so in self defense, and while the plaintiff was the aggressor and in the act of attacking him." There was a trial by jury and a verdict finding the defendant not guilty.

It is the theory of the plaintiff that a little after twelve o'clock on the night of February 11, 1921, while he was in the saloon of the defendant, and after having an argument with someone else who was in the saloon, the defendant, without justification, struck him, the plaintiff, on the head with a club, knocking him down and injuring him.

It is the theory of the defendant that he struck the plaintiff in self defense.

The evidence of Dorsey, the plaintiff, an ammonia plant operator, is that at about half past twelve the night of

February 11, 1921, he went into the defendant's saloon at 10734 Roxie Avenue with Albert Shack and John Eaton; that while they were at the bar having a drink two men came in and were given a pair of dice by the defendant; that they began to shoot craps on the floor; that one of them got into an argument; that he, the plaintiff, quit the game and went back to his companions at thebar; that one of the men came up and started to call him names and abuse him; that at that time Officer Curran came in and sat on a table; that while they were arguing Officer Curran told him to "Cut it out"; that the man walked away and came back a couple of minutes later and "he started again and I started after he started punching and Joe Mihalic run behind the bar and got a club and come running out and swung on me and missed me." "He come down, and I side-stepped and Officer Curran grabbed me by the lapels of my coat and told me to get out; in the meantime Joe Mihalic reached over Officer Curran's head and hit me (with a club) and I went down"; that at the time when he was hit he was standing about four feet from the bar; that he was picked up and pushed out of the door; that he then went to the doctor's office and had six stitches put in the wound and one of his ear drums, which seemed to be shattered, attended to; that he was treated by the doctor about six times and lost two weeks work. He described the club with which he was struck by the defendant as being round and an inch and a half in thickness and about twenty inches long. He testified further that about a week after the melee he saw the defendant and "He told me he hit me because he told me to quit shooting craps." On cross-examination he testified that it was By-Products pay night and that the defendant was behind the bar cashing checks and workmen were coming in and going out having their checks cashed; that in the course of the argument with the

man that was calling him vile names he pushed the man away but did not strike him; that all he had to drink was a couple of glasses of grape wine; that he had no whiskey. On re-direct examination he testified that he was earning $80.00 a week.

The evidence of one Shack is that on the night in question he went with the plaintiff and a man by the name of Paton into the defendant's saloon; that two men that were there coming out went back and began starting playing a piano; that then the three of them went over to the bar and had a couple of drinks, and the other two men came over and got a pair of dice from the bar keeper and started shooting craps; that they first started on the bar and then on the floor; that Officer Curran came in while the game was going on; that Dorsey quit and went up to the bar; that then the other man began calling Dorsey names and kept arguing with him and Dorsey told him to keep still; that if he didn't he would make him keep still; that Officer Curran then told the plaintiff to cut it out and the plaintiff answered, all right; that Officer Curran was at the time in uniform; that the defendant was behind the bar and "he got hold of a club and he came around to the front again with the club and he made a swing at Dorsey the first time and missed him"; that Officer Curran grabbed hold of Dorsey by the coat and "then Joe (the defendant) reached over with the club and hit Dorsey on the top of the head"; that Dorsey fell down on his knees and they took him out; that there was blood all over his head; that they were only in the saloon a few minutes; that they went to Dr. Murphy's office at South Chicago and then home; that the club was about twenty-two inches long and about an inch and a half in diameter; that before the defendant hit Dorsey he

told us to get out; that that was after he had first struck at the plaintiff and missed him. On cross-examination, he testified that the defendant told him to get out and the plaintiff said "all right"; that when the plaintiff argued with the other player over cheating the other player called the plaintiff some name and the plaintiff told him to shut up; that the plaintiff then pushed him away and then the defendant came out from behind the bar and swung the club and the defendant said, "get to hell out of here"; that Officer Curran got hold of the plaintiff and meanwhile the defendant reached over and hit the plaintiff on top of the head; that they were about three feet from the bar.

The evidence of one Paton who went into the saloon with the plaintiff at the time in question is to the effect that just after they entered the defendant handed two men who were there a pair of dice and they started shooting dice on the bar and "they enticed Dorsey into the game and they got down on the floor and all of a sudden Dorsey said 'You are cheating' and he left the game; and the other fellow come up and says, 'don't you accuse me of cheating I am square' and he grabbed Dorsey by the collar and Curan came in - in the meantime while the game was in progress Officer Curran was reading a newspaper - and Dorsey pushed this fellow away and he come back again and Dorsey says 'I won't have no argument with you at all' and Officer Curran came over and says, 'quit the argument I don't want to see any trouble'; and Joe (the defendant) run behind the bar, he was standing up against the stove, and he come out with a club and just then Officer Curran grabbed hold of Dorsey - pardon me - he swung at Dorsey and missed him and Curran got in between him and he swung over Curran's

tell us is just dirty; that, that we refer to as first phase of the plausibility and theory idea. By trial-consolidate, in testifying that the accusations, this line is yes, it's not the plausibility well "ski slides"; also when the scientist engage with the other player they checking the close rather matter the plausibility whom there's not bit plausibility hold the it work up when the probability that number the dog, one years the defendant does are from various the he not among the other the defendant the would, "yes a that was it to worry; that arrived therefore let hold of the plausibility we consider the defendant probably prior and the plausibility to bag at the head; just they were which there first to in the.

The evidence of for reason the need take to point of the plausibility of the there is consider it to the point that just after the, related the individual having the the where there a rib of this and long reached answering does to the bar and "they entered having bar the yes and they not case in the time and it at a season longer are for the charging" and he left the group and the other fellows were to man says, "don't you remember or if counting I am sparrow" the to grinned answer to the police and turner done is - to the measure with its jaws was to property fifteen turned was reading a newspaper - the latter pushed his lollipop away and to some book which you turned says "I don't know to explained with you or all" and fifteen turner were with and says, "only the sparrows I don't want to and say terribly" to the the defendant) two behind the bar, to the shoulder to mirror the store, and he rose at rib a club and then down fifteen turned graphic bags of heavy - pushed me - to sound to turner and rib- and the and turned yet to fifteen the and to young from January

shoulder and hit him on the head and Dorsey fell on the floor and we carried him out and Curran came out in front and we asked him if he arrested him (meaning the defendant) and he says he didn't, that he was traveling beat at that time."

The evidence for the defendant consisted of the testimony of the defendant, himself and two witnesses, Robert James and Walter Rup. The evidence of the defendant is to the effect that the plaintiff came into his place about half past eleven; that "He come in with two fellows and he got drunk; in my place he got soda and I wasn't outside of the bar." Further, that the plaintiff started to shoot craps with one Walter Rup; that when he saw them begin he said to them, "you cannot shoot craps in my place"; that one of the men took the plaintiff's fifty cents and then the plaintiff started to make trouble; that he, the defendant, told them they could not fight in his place; that the plaintiff said "I will fight you too and the entire bunch"; that he, the defendant, then said "You cannot do that in my place and I tell you straight when I come behind the bar I take a club and I take it straight and went up to him like that." "And I took the club up outside of the bar and he came towards me (the words, and he came towards me, are interlined in the record in ink) and I hit him on the head and that is all I know and he was on the floor." That Officer Curran came in just after he hit him on the head and he took them all out and the officer told him, the defendant, to lock the door. On cross-examination he testified that Officer Curran came in just as he hit the plaintiff.

The witness James testified that on the night in question he was working for the defendant behind the bar; that he

remembers the plaintiff, Paten and Shack coming in; that there were two other men in the saloon at the time; that he served the three men with two drinks; that the plaintiff started a crap game with one of the men; that he does not know whether the defendant gave the dice to the plaintiff; that he started the crap game with Walter Rup; that the defendant tried to stop the game; that the plaintiff and Rup started arguing; that the plaintiff insisted on fighting Rup; that Rup offered the plaintiff back fifty cents he won of him; that he, the witness, clamed the plaintiff down and that afterwards "he (meaning the plaintiff) proceeded in fighting the fellow again"; that they were playing craps only a minute or two; that "Dorsey was arguing with this fellow and wanted to fight him he said he served in the army and everything and he could lick anybody in the house and this fellow says he served in the army, too; and Joe (meaning the defendant) got sore and ordered Dorsey out and Dorsey still kept arguing and in the meantime when Joe was arguing with him, Joe got a stick he had and I was making up the pay roll, thatis counting the checks -- and I didn't see the close of it at all but as I looked around I saw Officer Curran come in the door and take Dorsey outside". On cross-examination he stated that there were five people besides himself in the saloon and that he thought "they were feeling pretty good."

The evidence of the witness Walter Rup is that he and his friend was standing at the bar when three others came in; that the plaintiff cashed a check while he and his friend were standing at the bar. He further testified "We were standing at the bar and Dorsey got his check cashed and he says 'come on, lets shoot crap.' and we was all going to shoot crap with him and he got the dice and rolled them on the bar and then we got on

the floor and shot for a half and he passed a couple of times and I shot a half dollar and I got a point for five and I threw right back and he says, 'you are crooked' and I says, 'If I am crooked here is your half dollar, I don't want any argument; you started the crap game I wouldn't shoot' and I walked out and Dorsey, he says, 'I will lick any man in the house here'; he told me what he was in the army and what he would do in here; I told him I didn't care what he did in here I was in the army and seen service the same as he did; so he come over and pushed me, I was standing at the bar there and never said anything and my friend was alongside of me and he says, 'lets get out before we start any trouble here, or fight' and I says, 'no, lets stay in here until they get out'; so they didn't get out and Joe (meaning the defendant) ordered them out and they didn't get out; so he come after me again and Joe gets a club and says, 'get out of here or I will hit you one' and they didn't get out and so Officer Curran come in and Dorsey just had me by the coat and then he was going to hit me, but he didn't hit me because I got away on him, and Joe come along and hit him over the shoulder with a club and that is all there is to it and they got out." On cross-examination he intimates that Officer Curran came in before the assault and that the plaintiff had hold of him, the witness, when the defendant came with a club and told the plaintiff to get out; that at that time Officer Curran was just back of him, the witness; that at the time the defendant struck the plaintiff Officer Curran had hold of the plaintiff. The record shows that Officer Curran at the time of the trial was at the Armory but that no subpoena was issued for him.

The doctor who attended the plaintiff shortly after the assault, testified that the plaintiff was bleeding snched

a cut about an inch and a half to two inches long on the top of his head; that he treated it and sewed it up with five sutures and put on a dry dressing; that he treated him for about a week and that the plaintiff called about five times.

The question arises does the evidence, showing as it does, practically admittedly, that the defendant struck the plaintiff, justify the jury in concluding that the defendant proved that he was entitled to strike the plaintiff as he did in defense of his property or himself or both; in other words is the verdict clearly against the weight of the evidence.

A close analysis of the evidence does not disclose much, if any, that even suggests that the plaintiff in any way threatened the property or person of the defendant. Not even the defendant's witnesses testify to any danger to the defendant or his property. And, the defendant himself, in his testimony, uses but one expression that suggests possible danger, and that is, "And I took the club up outside of the bar, and he came towards me and I hit him on the head, and that is all I know and he was onthe floor." The words "and he came towards me" are interlined in ink in the record. There is no evidence that the defendant was, or even believed he was menaced or threatened. The melee was in a so-called saloon. The plaintiff and some others had been playing a game of chance. The plaintiff and Rup had had some quarrel, the plaintiff charging Rup with cheating. And, although, the defendant may have been desirous of preventing "craps" being played on the premises - though the weight of the evidence is the other way - there is no testimony that even tends, with any sort of reasonable persuasiveness, to show that the defendant had the legal right to assault the plaintiff as he

did. The defendant's testimony leads only to the conclusion that, when Rup got fifty cents from the plaintiff, as the latter says, by cheating, and the defendant said you cannot fight in my place that the plaintiff responded, "I will fight you, too, and the entire bunch." That is denied, but taken with its context, it does not attain to the dignity of proof that would in any way justify such a brutal assault. Certainly it cannot be even plausibly maintained that the evidence shows that the defendant used no more force than was necessary. Woodman v. Howell, 45 Ill. 367; Gitzler v. Gitzel, 82 Ill. 322; Scott v. Fleming, 18 Ill. App. 539; Heimenschneider v. Bensis, 175 Ill. App. 172. The court said in Sorgenfrei v. Schroeder, 75 Ill. 397, "As it was, a very severe blow was inflicted, and it was not inflicted by the defendant in defense of his own person, habitation or property."

As to the contention that erroneous instructions were given, the record fails to show any objection to the instructions that were actually given, and it is the law that instructions, given in the Municipal Court, if not objected to before the jury retires cannot thereafter be considered. Bent v. Furnald, 159 Ill. App. 552; The Baldwin Co. v. Foley, 141 Ill. App. 300.

The judgment will be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

ill. The defendant's testimony leads only to the conclusion that, when they got fifty rods from the plaintiff, as the latter says, by [illegible], and the defendant [illegible]

As to the contention that erroneous instructions were given, [illegible]

The judgment will be reversed and the cause remanded [illegible]

Reversed and remanded.

[illegible], P.J. [illegible] [illegible], J. [illegible].

42 - 27870

NATHAN MITTLEMAN and SAMUEL MITTLEMAN, Doing Business as MITTLEMAN BROTHERS,
Appellees,

vs.

CHICAGO BOTTLERS CLEARING HOUSE ASSOCIATION, a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it for $1710, entered upon default for want of an affidavit of merits. A first and second affidavit of merits had been stricken and the court denied defendant's motion for leave to file another affidavit of merits.

The record shows that leave was given to file three affidavits of merit, so that the denial of the court to file a further affidavit related to the fourth affidavit of merits. It is discretional with the court as to the number of affidavits of merit which defendant may be permitted to file. It hardly can be said to be an abuse of discretion to deny defendant leave to file a fourth affidavit. If there was any valid defense defendant certainly could have stated it in his first or second affidavit. The court was not required to permit the filing of an indefinite number of affidavits of defense, and the action of the trial court in this respect was not error.

It is argued elaborately that the court erred in striking defendant's third affidavit of merits. Plaintiffs were lessees for a term of five years from May 1, 1918, under a written lease from defendant. Apparently it was to the advantage of the lessor to secure the cancellation of this lease so that the premises

might be rented to another tenant. The parties to the leases came to an agreement which was reduced to writing and executed April 23, 1921, by both parties under seal. This provided that the lease should be cancelled in consideration of defendant paying plaintiffs $2,160 in monthly installments. There were certain other provisions touching the new tenant with reference to what should happen if the new tenant should default in his lease. It was also provided that in the event defendant defaulted in the payment of any of these monthly installments, or if defendant sold the leased premises that the balance remaining unpaid should immediately become due and payable. Other provisions followed, concluding with the provision "that in all events, except if the said parties of the second part (the plaintiffs) shall retake possession of said premises, that the total sum of Twenty-one Hundred Sixty Dollars ($2160) shall be paid to said parties of the second part by the party of the first part (the defendant.)" This suit is for the balance due to plaintiffs on this contract.

The defense presented by the third amended and additional affidavit is in substance that on the same day that this written contract was executed an oral agreement was made between the parties concerning the cost of making repairs for the new tenant and a division of the loss if the new tenant should fail to pay the rent, and the cost of brokerage fees in securing a new tenant. The written contract under seal purported to cover the entire subject matter touching the cancellation of the lease between plaintiffs and defendant and the proposed renting to a new tenant, and this alleged verbal agreement was clearly an attempt to modify, vary, contradict and add to it. This is so obvious by comparing the written instrument with the alleged oral agreement that argument is unnecessary. It is well settled that such an alleged agreement resting in parol is inadmissible. An executory written contract under seal cannot be changed by an executory parol agreement. Linn v. Clark, 295 Ill. 22; Murphy v. Schnell, 248 Ill. 182;

Yockey v. Marion, 203 Ill. 343. Many other decisions might be cited.

The alleged parol agreement comes under none of the exceptions to the general rule and the trial court correctly struck it and properly denied the motion to file a further affidavit of merits.

The action of the trial court was in accordance with law, and the judgment is affirmed.

AFFIRMED.

Matchett, J., concurs.

76 - 27908

(3182)

SOVEREIGN CAMP WOODMEN OF THE WORLD, etc.,
Complainant,

vs.

EVA HEYMAN and EDITH WISE,
Defendants.

On the Appeal of EDITH WISE,
Appellant,

vs.

EVA HEYMAN,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

230 I.A. 0484

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Upon filing a bill of interpleader the court found that defendant, Eva Heyman, was entitled to the fund in question amounting to $986, and the other claimant, Edith Wise, appeals.

In September, 1916, the Sovereign Camp Woodmen of the World issued to Alexander H. Heyman, the husband of Eva Heyman, a benefit certificate for $1,000, payable on his death to his wife. He died June 12, 1919, and his wife and Edith Wise, his sister, each claimed the exclusive benefit of the policy. The Sovereign Camp filed its bill of interpleader making the two claimants defendants, paid the amount of the policy, less costs, to the clerk and prayed that the conflicting claims be adjusted by the court.

There is virtually no dispute as to the facts. Eva Heyman, the wife, was named in the policy as the beneficiary. The by-laws of the Sovereign Camp provided that the insured might change his beneficiary by making a request in writing on the back of the certificate with the name of the new beneficiary, delivering this with a fee of twenty-five cents to the clerk of

the Camp, who should endorse thereon the fact of the payment and delivery, the date of the same, and then deliver it to the Sovereign clerk. In case of the death of such a member before the issuance of a new certificate to the new beneficiary, the amount payable should be paid to the newly designated beneficiary, according to the terms of the member's request. Upon receipt of the request, endorsed as aforesaid, the Sovereign clerk should issue a new certificate payable to the new beneficiary. This was subject to a proviso that "no change of beneficiary shall be allowed or be binding on this Society or any beneficiary which is not requested in writing as herein provided more than twenty-four hours before the death of said member."

The insured intended to change the beneficiary from his wife to his sister, Edith Wise, but the evidence tends to show and the court found that this attempted change did not become effective by reason of the aforesaid proviso.

Three days before the death of Heyman he requested his nephew, William Wise, a son of Edith Wise, to get his benefit certificate, which was in his office, so that he might endorse the same with his request that the beneficiary be changed from Eva Heyman to Edith Wise, his sister. This nephew testified that he went to the office and found that Mr. Heyman's law partner had the key to the vault, and the witness says that he could not get into it, but that he got the policy three days afterwards; that he then brought it to his uncle, then seriously ill at the hospital, who affixed his mark to the request for change of the beneficiary, and William Wise brought the certificate to the office of the Sovereign Camp and paid the fee of twenty-five cents for effecting the change. This was about two o'clock in the afternoon of June 12th. Mr. Heyman died at about eight o'clock in the evening of the same day about six hours after the request was signed

the lump, the insurer within thirty the last of the payment and delivery, the date of the case, and then deliver it to the Brotherhood clerk. In case of the death of such a member before the issuance of a new certificate to the new beneficiary, the amount payable should be paid to the newly designated beneficiary, according to the terms of the member's request. Upon receipt of the receipt, endorsed as aforesaid, the insurance clerk should issue a new certificate payable to the new beneficiary. This was subject to a proviso that "no change of beneficiary shall be allowed or be binding on this Society or any beneficiary which is not requested in writing at Parole provided more than twenty-four hours before the death of said member."

The insured intended to change the beneficiary from his wife to his sister, Edith Wise, and the evidence tends to show and the court found that this attempted change did not become effective by reason of the aforesaid proviso.

Three days before the death of Hayden he requested his nephew, William Wise, a son of Edith Wise, to get his benefit certificate, which was in his office, so that he might endorse the same with his request that the beneficiary be changed from Eva Heyman to Edith Wise, his sister. This nephew testified that he went to the office and found that Mr. Heyman's law partner had the key to the vault, and the witness says that he could not get into it, but that he met the entire three days afterwards; that he then brought it to his home, then exclusively his at the hospital, who arrived him most to the request for change of the beneficiary, and William Wise brought the certificate to the office of the Woodmen Camp and said the fee of twenty-five cents for effecting the change. This was about two o'clock in the afternoon of June 14th. Mr. Heyman died at about eight o'clock in the evening of the same day about six hours after the request was signed

by him. Subsequently a new certificate was issued by the Sovereign Camp, wherein Edith Wise was named as beneficiary, but this was not until after the death of Heyman and was issued without the officers knowing that Heyman had died or that the request for change of beneficiary had not been executed twenty-four hours prior to the time of his death, as required by the by-laws.

The claimant, Edith Wise, contends that where an insured has changed his beneficiary and the only thing left to be done is a formal or ministerial act, equity will decree that done which ought to be done, and validate the change. The supporting cases cited are cases where it appears that the insured did all that he could to to effect a change, and the failure was in some formal act on the part of the officers of the insurance company. That is not this case. It does not appear that Heyman did all that he could have done properly to change his beneficiary in accordance with the by-laws. He was seriously ill at least three days before his death. At this time he requested his nephew to get the certificate for the purpose of requesting a change, but there is no sufficient explanation as to why the certificate was not delivered to Mr. Heyman until three days thereafter. So far as the record shows, Mr. Heyman's law partner, who was said to have the key to the vault, might have been seen and the certificate obtained at any time between the first visit of the nephew to the office and the second visit, three days afterwards, when he got the certificate. The record does not show that at any time during this interim Heyman made any inquiries concerning the certificate or suggested where his partner might be found to give access to the vault. Had the policy been procured at any time on the first of the three days before Heyman's death, or on the second day, and the request then been made, it would have been in time. There is persuasive force in the argument that for nearly three days, so far as the record shows, Mr. Heyman had either

by him. Subsequently a new certificate was issued by the Governing Body, wherein Mr. Ellis was named as beneficiary, but this was not until after the death of Lyman and was issued without the officers knowing that Lyman had died or that the request for change of beneficiary had not been executed twenty-four hours prior to the time of his death, as required by the by-laws.

The question, Mr. Ellis Pl., contends that where an insured has changed his beneficiary and the only thing left to be done is a formal or ministerial act, equity will decree that has been right to be done, and validate the change. The supporting cases cited are cases where it appears that the insured did all that he could to effect a change, and the failure was in some formal act on the part of the officers of the insurance company. That is not this case. It does not appear that Lyman did all that he could have done properly to change his beneficiary in accordance with the by-laws. He was certainly ill at least three days before his death. At this time he requested his brother to get the certificate for the purpose of requesting a change, but there is no sufficient evidence that he ever the certificate was not delivered to Mr. Lyman until three days thereafter. So far as the record shows, Mr. Lyman's law partner, who was said to have the key to the vault, might have been seen and the certificate obtained at any time between the first visit of the nephew to the office and the second visit, three days afterwards, when he got the certificate. The record does not show that at any time during this interim Lyman made any inquiries concerning the certificate or suggested where his partner might be found to give access to the vault. And the policy was presented at any time on the first of the three days before Lyman's death, or on the second day, and the request been been made, it would have been in time. There is persuasive force in the argument that for nearly three days, so far as the record shows, Mr. Lyman had either

forgotten or was indifferent to the attempted change of beneficiary. The failure of William Wise to secure the certificate in time to have the request for the change effectually made must be considered as the failure of Mr. Heyman.

It has been many times held that where the by-laws or policy provide for the time and method by which a beneficiary may be changed, such change does not become effective unless it is made in accordance with the terms of the by-laws or policy. Hodalski v. Hodalski, 181 Ill. App. 158; Freund v. Freund, 213 Ill. 139.

The provision that application for a change in the beneficiary must be requested in writing more than twenty-four hours before the death of a member is not, as contended, a provision that the insured must live a certain time as a condition subsequent or an attempt to control an act of God, and hence unreasonable and contrary to public policy as providing an incentive to hastening the death of a sick man who has changed his beneficiary. The mere statement of this proposition demonstrates its unsoundness. See note vol. 13, Corpus Juris, p. 641, quoting from opinion in School District No. 1 v. Dauchy, 25 Conn. 530.

Provisions like the instant one have been enforced not only because of the contractual obligation of the parties, but also because the beneficiary named in the certificate has rights therein. They may not be vested rights, but they are a right to the proceeds of the certificate subject to the right of the member to change the beneficiary according to the terms of the by-laws; and the right of the beneficiary to have this contract carried out in the manner provided for is as binding upon the member as his right to change the beneficiary is binding upon the beneficiary. Niblack on Societies, 415 and 416.

The award of the court to Eva Heyman was justified both on precedent and reason, and it is affirmed.

AFFIRMED.

Matchett, J., concurs.

Jamestown or was indifferent to the attempted change of beneficiary. The failure of William Wise to secure the certificate in time to meet the rights of the change effectively was not a constituent as the failure at St. Simons.

It has been many times held that where the by-laws or policy provide for the time and method by which a beneficiary may be changed, that change has not been effective unless it is made in accordance with the terms of the by-laws or policy. Supreme v. Schlecht, 128 Ill. App. 1[illegible]; Trenwo v. Grand, 218 Ill. 1[illegible].

The provision that application for a change in the beneficiary must be accompanied by written proof that twenty-four hours before the death of a member it did, we postulate, a provision that the insured must live a certain time as a condition subsequent or an attempt to control an act of God, and hence unreasonable and contrary to public policy as providing an incentive to shortening the time of a sick man who has changed his beneficiary. The mere statement of this proposition demonstrates its unsoundness. See note vol. 14, Lawyers Cases, p. 6[illegible], quoting from opinion in Grand Lodge in v. Kenney, 30 Ohio. 5[illegible].

Provisions like the instant one have been enforced not only because of the contractual obligations of the parties, but also because the beneficiary named in the certificate has rights thereto. They may not be vested rights, but they are a right in the proceeds of the individual certificate as the right of the member to change the beneficiary according to the terms of the by-laws; and the right of the beneficiary to have this contract carried out in the manner provided for is as binding upon the member as his right to change the beneficiary is binding upon the beneficiary. Kilgore on Insurance, 41[illegible] and 41[illegible].

The equity of the court to give Dagmar was justified both on precedent and reason, and it is affirmed.

AFFIRMED.

Marshall, J., dissents.

(3/83a)

102-27934

GEORGE GLEZOS, Defendant in Error, vs. VASILIOS GLEZOS, Plaintiff in Error.	ERROR TO SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff in an action of assumpsit, upon trial by jury had a verdict for $2,500, "with interest." Upon this judgment was entered for $3,885.42, which defendant seeks to have reversed.

The parties are brothers. Plaintiff testified that at one time he loaned defendant $1,000 and that at another time he gave him $2,500 to buy a house and lot with an agreement to take title to the property in both their names; that some years afterwards he discovered that defendant had not taken title to the property in both their nemes and he demanded the return of the money, together with the payment of the $1,000 previously loaned. Two witnesses gave testimony tending to establish an admission by defendant of this alleged indebtedness. On the other hand, defendant denies that he obtained $2,500 from his brother and claims that the only money he ever borrowed was $1,000, which was paid. It was further asserted as a defense that plaintiff had brought suit against defendant in the Municipal court of Chicago for this alleged advance of $2,500 and also the $1,000 loaned; that defendant in that suit denied that he owed more than $1,000; defendant also filed a set-off claiming $1,775 to be due from plaintiff to defendant for rent. Defendant in the present suit offered evidence tending to show that, pending this former suit, the parties agreed to settle all their differences and claims by the acceptance by plain-

No. 17724.

Gaston Gibbons, Defendant in error, vs. Vallie Gibbons, Plaintiff in error.	ERROR TO SUPERIOR COURT COOK COUNTY.

Mr. JUSTICE FRANK DUNCAN
DELIVERED THE OPINION OF THE COURT.

Plaintiff in an action of assumpsit, upon trial by jury had a verdict for $2,800, "with interest." Upon this judgment was entered for $2,388.42, which defendant seeks to have reversed.

The parties are husband. Plaintiff testified that at one time he loaned defendant $1,000 and that at another time he gave him $3,800 to buy a home and for this he expressed it was little to the property in both their names; that some years afterwards he discovered that defendant had not taken title to the property in both their names and he demanded the return of the money, together with the payment of the $1,000 previously loaned. The witnesses gave testimony tending to establish an admission by defendant of this alleged indebtedness. On the other hand, defendant denies that he obtained $3,800 from his brother and claims that the only money he ever borrowed was $1,000, which was paid. It was further asserted as a defense that plaintiff had brought suit against defendant in the municipal court of Chicago for this alleged advance of $3,800 and also the $1,000 loaned, that defendant in that suit denied that he had more than $1,000, defendant also filed a set-off claiming $1,775 to be due from plaintiff to defendant for rent. Testimony in the present suit offered evidence tending to show that, pending this former suit, the parties agreed to settle all their differences and claims of the aforesaid by plaintiff

tiff of defendant's promissory note for $1,000, payable five years after date with interest at 6 per cent secured by a trust deed conveying real estate in Cook County, Illinois. A stipulation to this effect was introduced in evidence which purported to be signed by the respective parties and by their respective attorneys, the plaintiff, George Glezos, signing the same by making his mark. The stipulation so executed was filed in the Municipal court case which was thereupon dismissed pursuant to this agreement. Witnesses who were present at the time, including the attorney representing George Glezos in the Municipal court case, gave testimony in substantial accord to the effect that this stipulation represented the understanding and agreement of all the parties. The only contradictory evidence to this is the testimony of plaintiff, who said that he did not sign the document by making his cross.

The defense of a compromise and settlement of plaintiff's claim against defendant was so convincingly supported by the evidence that the verdict against it cannot be accounted for except by errors upon the trial tending to mislead the jury.

We are of the opinion that the attitude of the trial Judge towards defendant was such as to lead the jury to believe that the court was hostile to the defense. This is shown by the extended cross-examination of defendant by the court; its character had a tendency to indicate a critical, not to say incredulous attitude of the court. The Judge expressed his opinion as to who wrote the name of plaintiff upon the stipulation, saying that it looked more like defendant's handwriting than the handwriting of plaintiff's attorney. We are persuaded that the general tenor and character of the questions and remarks of the court were calculated to make the jury believe that the defense was without merit and that defendant and his witnesses were not testifying truthfully. Such conduct, of

tiff of defendant's promissory note for $1,000, payable five years after date with interest at 6 per cent secured by a first lien covering real estate in Cook County, Illinois. A stipulation to this effect was introduced in evidence which purported to be signed by the respective parties and by their respective attorneys, the plaintiff, George Simons, signing the name by making his mark. The stipulation as executed was filed in the municipal court case which was thereupon dismissed pursuant to this agreement. Witnesses who were present at the time, including the defendant testifying herein, stated in the municipal court case, gave testimony in substantial accord to the effect that this stipulation represented the understanding and agreement of all the parties. The only contradictory evidence to this is the testimony of plaintiff, who said that he did not sign the document by making his mark.

The failure of a consideration and settlement of plaintiff's claim against defendant was so convincingly supported by the evidence that the verdict against it cannot be considered too clearly to outweigh the total lack of evidence in defense.

We are of the opinion that the activities of the trial judge herein defendant was just as at least the jury to believe that he were not hostile to the defense. This is shown by the minimal cross-examination of defendant by the court; the character had a tendency to indicate a neutral, not to say favorable attitude of the court. The judge expressed his opinion as to the weight the case of plaintiff upon the stipulation, saying, that it looked more like defendant's contention that the signature of plaintiff's attorney. It was proved that the signature was genuine and the question was remarks of the judge were calculated to detract [illegible] that the failure was without doubt the main determinant [illegible] and the witnesses upon his testimony [illegible]. Upon analysis, it

course, was prejudicial error requiring a reversal as has been held in a number of similar cases. People v. Schultz, 300 Ill. 601.

The court erroneously instructed the jury that if it believed that defendant was indebted to plaintiff for $3,500 and that the amount of this indebtedness "was not in dispute" and that defendant paid $1,000 of said indebtedness and plaintiff accepted the same, "such acceptance of $1,000 would not be a satisfaction of the whole amount of $3,500, but only a payment on account." This instruction improperly assumes that at the time of the alleged settlement there may have been no dispute between the parties as to their respective claims against each other. The evidence proved that there was a dispute which was the subject matter of the suit in the Municipal court.

Furthermore, it was not claimed by either plaintiff or defendant that the $1,000 paid by defendant at the time of the settlement was in payment of $3,500. Plaintiff claimed to have advanced $2,500 to defendant who denied it.

The instruction is also misleading as ignoring the character of the defense which was that the matters in dispute were settled by compromise and agreement.

The verdict was for $2,500 with these words added: "Interest at 5 per cent per annum." The court amended the verdict by computing the interest from a date, arbitrarily fixed, and adding this to $2,500 and entered judgment for the total. The court could not arbitrarily fix a time when the alleged indebtedness commenced to draw interest, for the fact of such indebtedness was an issue in the case. While under some circumstances the court may compute the interest upon a verdict, yet the better practice is to have the jury do this and return a verdict for the entire amount.

Both by motion and in his brief, counsel for plaintiff

course, was arithmetical error requiring a reversal as has been made in a number of similar cases. Gracie v. Hendrie, 24 Ill. 271.

The court erroneously instructed the jury that if it believed that defendant was indebted to plaintiff for $2,000 and that the amount of this indebtedness "was not in dispute" and that defendant paid $1,000 of said indebtedness and plaintiff accepted the same, "such acceptance of $1,000 would not be a satisfaction of the whole amount if $2,000, but only a payment on account." This instruction improperly assumes that at the time of the alleged settlement there may have been no dispute between the parties as to their respective claims against each other. The evidence proved that there was a dispute which was the subject matter of the suit in the municipal court.

Furthermore, it was not claimed by either plaintiff or defendant that the $1,000 paid by defendant at the time of the settlement was in payment of $2,000. Plaintiff claimed to have assumed $2,000 to defendant who denied it.

The instruction is also misleading as ignoring the character of the defense which was that the matters in dispute were settled by compromise and agreement.

The verdict was for $2,000 with costs which allowed "interest at 6 per cent per annum." The court assessed the verdict by computing the interest from a date, arbitrarily fixed, and adding this to $2,000 and entered judgment for the total. The court could not arbitrarily fix a time when the alleged indebtedness commenced to draw interest. For the test of such indebtedness was an issue in the case. While under some circumstances the court may compute the interest upon a verdict, yet the better practice is to have the jury in this not return a verdict for the entire amount.

Such is matter not in the record, because the plaintiff

attacks the accuracy of the bill of exceptions, asserting that improper changes have been made therein. This is denied by opposing counsel. It is not claimed that any changes have been made after the record was filed in this court. The certificate of the trial Judge imports the verity of the record and we cannot consider any claim of alterations said to have been made before the record was filed in this court.

Other points are suggested but as there must be another trial, we shall not comment thereon. The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett and Johnston, J. J., concur.

attacks the moral of the bill of exceptions, insisting that lawyer counsel have been made hostile. This is denied by appellee counsel. It is not claimed that any objection was made after the verdict was in this court. The qualifications of the trial judge judging the temper of the jury and the number available in place of alternations would be more than only before the jury had filed in this court.

Some points are raised that we think need no extended trial, as they will not change result. The judgment is affirmed at the costs in transitu.

Reversed and Remanded, J. J., concur.

122 - 27956

(3184a)

THE PEOPLE OF THE STATE OF ILLINOIS ex rel. Laura Frantzen, Appellee,

vs.

ADOLPH HOLUM, Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a proceeding under the Bastardy Act, tried by the court, in which defendant was found to be the father of relatrix's child. Defendant appeals from the judgment.

Relatrix testified that she had intercourse with defendant on May 7, 1921, and on May 11. Defendant admits this, but differs slightly as to the dates. Her child was born February 6, 1922.

The defense asserted is that relatrix also had intercourse with a Wendell Keirky in May, and if this is a fact, the evidence tends to show that it would be impossible to tell which of the two men was the father of her child. The evidence of the alleged connection of relatrix with Keirky rests upon admissions said to be made by her and certain statements in letters she wrote to both defendant and Keirky. The relatrix denied that she had intercourse with Keirky at any time, and undertakes to explain her alleged admissions and allusions in her letters by testifying that a few days after June 6 she had a conversation with Keirky, who told her that defendant had told him he would not marry her or have anything more to do with her because she was pregnant; that Keirky at this time made improper proposals to her, which she refused. Relatrix says it was this incident she had in mind when she told certain of the witnesses that Keirky had "insulted" her.

Keirky was not produced as a witness and did not appear at the trial. There was some grounds for a suspicion that the relatrix had been intimate with Keirky; but in face of her direct denial of this, and in view of her plausible explanation of her alleged admissions, the admitted connection of the defendant with the relatrix, and the birth of her child thereafter within the normal period of gestation, we cannot say that the trial Judge improperly concluded that the defense was not proven.

The issue rested largely upon the credibility of the witnesses, and the Judge who heard and saw them can better determine this than can a court of review. The record does not justify a reversal, and the judgment is affirmed.

AFFIRMED.

Matchett, J., concurs.

139 - 27973

IN RE ESTATE OF WINFIELD SCOTT THURBER, deceased, ——— CORPORATION OF THE FINE ARTS BUILDING, Appellant, vs. CHICAGO TITLE & TRUST COMPANY, administrator de bonis non of the estate of Winfield Scott Thurber, deceased, Appellee.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY

DELIVERED THE OPINION OF THE COURT.

Corporation of the Fine Arts Building, appellant, is seeking to have allowed as an expense administration of the estate of Winfield Scott Thurber, deceased, the fair rental value of premises formerly occupied by Thurber in his business and after his death occupied for a time by his widow, the executrix of his estate.

This matter has heretofore been in this court, where we held that this claim was a proper expense of administration and reversed the Circuit Court. In Re Estate Winfield Scott Thurber, 209 Ill. App., 533. The Supreme Court subsequently reversed this court and affirmed the Circuit Court. Chicago Title & Trust Co. v. Corporation of the Fine Arts Building, 288 Ill. 142. The opinions in these cases state the proceedings at length so that we shall not at present repeat them.

Subsequently the appellant filed its supplementary petition in the Probate Court asking that the fair rental value of the premises from October 1, 1914, to April 1, 1915, be allowed as an expense of administration. A demurrer was filed

IN RE ESTATE OF CHRISTINE BOOTT THURBER, deceased.

CHRISTINE BOOTT THURBER COMPANY, Appellant,

vs.

CHICAGO TITLE & TRUST COMPANY, administrator in behalf and of the estate of Winfield Scott Thurber, deceased, Appellee.

Appeal from Circuit Court of Cook County.

DELIVERED THE OPINION OF THE COURT.

Corporation of the Fine Arts Building, appellant, is seeking to have allowed as an expense administration of the estate of Winfield Scott Thurber, deceased, the fair rental value of premises formerly occupied by Thurber in his business and after his death occupied for a time by his widow, the executrix of his estate.

This multifarious proceedings has in this year, where we held that this claim was a proper expense of administration and reversed the Circuit Court. In re Estate Winfield Scott Thurber, 349 Ill. App., 588. The Supreme Court subsequently reversed this court and affirmed the Circuit Court. Chicago Title & Trust Co. v. Corporation of the Fine Arts Building, 348 Ill. 142. The opinions in these cases state the proceedings at length so that we shall not at present repeat them.

Subsequently the appellant filed its supplementary petition in the Probate Court asking that the fair rental value of the premises from October 1, 1918, to April 1, 1919, be allowed as an expense of administration. A demurrer was filed

to this petition which was withdrawn after hearing, and an answer filed reserving the right to demurrer in the Circuit Court. The Probate Court disallowed the claim and dismissed the petition. The appellant thereupon appealed to the Circuit Court where hearing was had on the demurrer reserved by the estate in its answer. The Circuit Court sustained the demurrer and dismissed the petition and from this order, Corporation of the Fine Arts Building appeals.

It is urged by counsel for the estate that the question involved is res adjudicata by the opinion of the Supreme Court, while opposing counsel insist that that opinion clearly states that the claim for this rent as an item of expense of administration was not presented upon the record and for that reason alone reversed the judgment of the Appellate Court. Inspection of the Supreme Court opinion supports this assertion. However, we cannot escape the conclusion after reading the Supreme Court opinion carefully that it was intended to express and convey an opinion as to the propriety of this claim as part of the expense of administration. We refer particularly to the language of the opinion on page 149 of the Supreme Court Reports, vol. 288. This may be dictum but we do not understand that dictum in an opinion of the highest court is to be ignored in all cases. Following therefore what we believe was intended to be an expression of opinion by the Supreme Court on this question we hold that the claim of the appellant should not be allowed as an expense of administration, and that the judgment of the Circuit Court should be affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

to this petition which was objected after hearing, and an order filed reserving the right to demurrer in the Circuit Court. The Probate Court disallowed the claim and dismissed the petition. The appellant thereupon appealed to the Circuit Court where hearing was had on the demurrer reserved by the estate in its answer. The Circuit Court sustained the demurrer and dismissed the petition and from this order, Corporation of the Fine Arts Building appeals.

It is argued by counsel for the estate that the question involved is one adjudicable by the opinion of the Supreme Court, while appellant counsel insist that that opinion clearly states that the claim for this rent as an item of expense of administration was not presented upon the record and for that reason alone reversed the judgment of the Appellate Court. Inspection of the Supreme Court opinion supports this assertion. However, we cannot resolve the substantial effect upon the opinion from which conclusion that it was intended to express and convey an opinion as to the propriety of this claim as part of the expense of administration. We refer particularly to the language of the opinion on page 148 of the Supreme Court reports, vol. 388. This may be dictum but we do not understand that dictum in an opinion of the highest court is to be ignored in all cases. Following therefore what we believe was intended to be an expression of opinion by the Supreme Court on this question we hold that the claim of the appellant should not be allowed as an expense of administration, and that the judgment of the Circuit Court should be affirmed.

Affirmed.

Mathews and Goodwin, JJ., concur.

140 - 27974

IN RE ESTATE OF WINFIELD SCOTT THURBER, deceased.

TRUSTEES OF THE ESTATE OF CHARLES A. CHAPIN, deceased,
Appellants,

vs.

CHICAGO TITLE & TRUST COMPANY, administrator de bonis non of the estate of WINFIELD SCOTT THURBER, deceased,
Appellee.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

This is a companion case to 27973, in which opinion has been filed by us this day. The trustees of the estate of Charles A. Chapin, deceased, acquired by deed April 1, 1919, all the rights and interests of the Corporation of the Fine Arts Building and have exercised the relation of landlord of said premises. The trustees asked for rental as an expense of administration of the estate of Winfield Scott Thurber, for a period from April 1, 1919, to October 1, 1916, which is a period subsequent to and following the period for which the Corporation of the Fine Arts Building asked for rental in case number 27973.

What we said in that opinion is applicable to the present case and for the reasons stated therein, the judgment of the Circuit Court is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

(3/87a)

153 - 27988

THE MONTROSE BACHELOR APARTMENTS, an Illinois Corporation, Appellant,	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
vs.	
ELI H. WASHBURN, Appellee.	

MR. PRESIDING JUSTICE McCURDY DELIVERED THE OPINION OF THE COURT.

Plaintiff alleged that defendant, in his fiduciary capacity as treasurer, collected money for plaintiff and unlawfully converted the same to his own use; also that he bought merchandise in the name of plaintiff and converted the same to his own use. Upon trial the jury found for defendant and from the judgment thereon plaintiff appeals.

No point is made in plaintiff's brief that the verdict is contrary to the weight of the evidence, hence it is unnecessary to comment thereon further than to say that upon the record no other verdict could properly have been returned. Defendant did not keep the books. The cash was accessible to Lundstrom, president of plaintiff, also to his daughters, the night clerk and telephone operator, and the defendant. Lundstrom took cash from the drawer whenever he wished, leaving his I.O.U., and guests of the plaintiff receiving cash left a similar note. An auditor testifying for plaintiff said that under the bookkeeping system there had always been discrepancies occurring from carelessness, or that money was expended for which vouchers were not obtained, and that no proper balance could be struck under the system they were using. Plaintiff wholly failed to prove that the alleged discrepancies were chargeable to defendant.

THE NATIONAL BUSINESS LAUNDRY,
an Illinois corporation,
defendant,

vs.

ALI B. VANDERS,
defendant.

APPEAL FROM
CIRCUIT COURT OF
COOK COUNTY.

HONORABLE

MR. PRESIDENT JUSTICE MCCULLOUGH
DELIVERED THE OPINION OF THE COURT:

PLAINTIFF alleges that defendant, in his fiduciary capacity as treasurer, collected money for plaintiff and deliberately converted the same to his own use; also that he brought merchandise in the name of plaintiff and converted the same to his own use. Upon trial the jury found for defendant and from the judgment thereon plaintiff appeals.

No point is made in plaintiff's brief that the verdict is contrary to the weight of the evidence, hence it is unnecessary to recount therein further than to say that some the proceed on other matters would properly have been returned. Defendant did not keep the books. The book was accessible to landlords, creditors of plaintiff, also to his employees, the clerks since not taken phone operator, and the defendant. Deliveries were made from the dryers wherever he wished, leaving his i.o.u.'s, and proceeds of the plaintiff receiving such left a similar note. On cross-exam-ine for plaintiff was that under the bookkeeping system the cash sales been disconnected coming from merchandise, or that money was expended for which vouchers were not obtained, and that no proper balance could be struck under the system they were using. Plaintiff wholly failed to prove that the claimed disappearance were chargeable to defendant.

Some argument is attempted based upon the items shown by a bill of particulars filed. This bill of particulars is not incorporated in the bill of exceptions and cannot be considered as evidence. Fowler v. Cade, 214 Ill. App. 153; Hess Co. v. Dawson, 149 Ill. 138.

Plaintiff's brief criticizes the instructions for singling out portions of the evidence and giving undue prominence to them. This refers to the instructions as to the legal effect of the contract of employment between the parties which provided that the plaintiff should keep the books. The instructions properly gave the law to the jury and contained nothing harmful to plaintiff the giving of which would require a reversal.

Plaintiff has referred in its argument to matters not presented in its brief of points. Under rule 19 of this court "The argument shall be confined to discussion and elaboration of the same points contained in the brief and none other, and the points shall be argued in the order in which they are made; a point made but not argued may be considered as waived."

The verdict properly followed the evidence and as there were no substantial errors upon the trial, the judgment is affirmed.

AFFIRMED.

Matchett and Johnston, JJ., concur.

Some reasons in criminal cases even can issue upon a bill of particulars filed. This bill of particulars is not incorporated in the bill of exceptions nor should it constitute as evidence. Bunker v. State, 314 Ill. App. 1(3); Dent Co. v. Bunton, 140 Ill. 326.

Plaintiff's brief criticizes the instructions for admitting not particulars of the evidence and giving undue prominence to them. This refers to the instructions in the legal effect of the instructions or explanatory notices the jurisdiction which provided that the Plaintiff should keep the verdict. The instructions properly gave the law to the jury and contained nothing harmful to Plaintiff the issues of which would consider a reversal.

Plaintiff has referred in its argument to matters not presented in the brief or points. Under rule 16 of this court the appellant shall be confined to discussion and citation of the same points contained in the brief and some order, and the points shall be argued in the order in which they are made; a point made but not argued may be considered as waived."

The verdict properly follows the evidence and no there were no substantial errors upon the trial, the judgment is affirmed.

AFFIRMED.

Bachelder and Johnston, Ill., counsel.

212 - 28047

PHILIP J. KLINGMAN, Appellee, vs. WALTER F. HALLEMAN, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff bringing suit for damages for an alleged breach by defendant of a contract for the sale of certain real estate, upon trial by a jury had judgment for $1,500, from which defendant appeals. Plaintiff does not appear here to support his judgment.

March 8, 1930, the parties entered into a written contract for the sale of the real estate in question for $9,000, plaintiff paying to defendant $100 as earnest money. The contract was in the usual form, the seller agreeing to furnish a complete abstract of title within a reasonable time, and plaintiff was given opportunity to examine the same and report material defects.

The record does not show clearly why the sale was not consummated. Defendant testified that through his attorney he ordered the abstract brought down to date and that he notified the plaintiff to call at this attorney's office for the abstract. Plaintiff promised that he would do so but although the abstract was at the attorney's office for some time, plaintiff did not call for it. Defendant testified that he was ready and willing at all times to go right on with the deal. Plaintiff and his father testified that in the latter part of March defendant told them that he was ready to go through with the deal but that his wife refused to sign the deed.

This judgment must be reversed and the cause remanded because of improper instructions. In one part of the instructions the court told the jury that if the wife would not sign the contract the defendant was excused from doing anything further; but the jury was also instructed that if defendant said his wife would not sign the contract then the jury should find the issues for the plaintiff. These instructions were contradictory and calculated to mislead the jury.

The jury was further told that the damages to be assessed should be the "difference between the contract price" and the "actual value at the time of the deal." There was no evidence as to the "actual" value. The measure of damages, if any, is the difference between the contract price and the market value at the time of the alleged breach of the contract. White v. Hermann, 51 Ill. 243; Kadish v. Young, 198 Ill. 170.

No argument or decisions are presented to us touching the legal effect of a refusal by the wife of the seller to sign the deed of conveyance contemplated by the contract of purchase.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Matchett and Johnston, JJ., concur.

This judgment must be reversed and the cause remanded because of improper instructions. In one part of the instructions the court said the jury that if the wife would not sign the conveyance the defendant was excused from doing anything further; but the jury was also instructed that if defendant said his wife would not sign the contract then the jury would find the issues for the plaintiff. These instructions were contradictory and calculated to mislead the jury.

The jury was further told that the inquiry to be answered should be the "difference between the contract price" and the "actual value at the time of the deal." There was no evidence as to the "actual" value. The measure of damages, if any, is the difference between the contract price and the market value at the time of the alleged breach of the contract. Tobin v. Brown, 21 Ill. 542; Smith v. Young, 124 Ill. 470.

No argument or instruction was presented to us touching the legal effect of a refusal by the wife of the maker to sign the deed of conveyance contemplated by the contract of purchase.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Mulkey and Dunn, JJ., dissent.

225 - 28060

ROBERT W. TAFT, Appellant, vs. DR. A. HEYM, Appellee.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit upon a promissory note for $2500 executed by defendant to the order of Rodent Exterminator Laboratories, Inc., transferred by endorsement to the plaintiff. The defense was that the note was given under certain conditions, which failed. Upon trial by a jury defendant had a favorable verdict and it was adjudged that plaintiff take nothing. From this judgment plaintiff appeals.

Plaintiff was president of the Rodent Exterminator Laboratories and Carl Weiss was its vice-president. Defendant was a stockholder in the company. Shortly prior to June, 1920, the corporation made application to the Secretary of State of Illinois to increase its capital stock from $50,000 to $110,000. Defendant testifies that he was solicited by Weiss to buy some of the increased capital stock, and told him "I was willing to do this provided the money should be used for increasing the business of the company and in providing Weiss with funds to go to New York to establish a branch office of the company there." Weiss agreed to this and thereupon the note in question was executed and delivered to Weiss, together with a letter. The contents of this letter are in dispute. Weiss says that he received the letter and delivered it to Mr. Taft, who claims that he mailed it back to Weiss three or four months later at

his request. Weiss denies that he ever received it. The defendant stated that the contents of the letter were that he was buying the fifty shares of the increased capital stock of the Rodent Exterminator Laboratories "provided that the money is used for increasing the business of the company, and for making it possible for Dr. Weiss to open a branch office in New York." This version of the transaction is corroborated by Weiss, who testifies to the same effect and that this transaction with the defendant was after he had consulted with Taft. There was sufficient evidence to justify the jury in accepting defendant's version of the matter.

It is also shown that defendant did not receive any of the new stock, but that Taft turned into the corporation treasury fifty shares of original stock held by him, which stock was turned over to the defendant. After defendant discovered this he informed Taft that he could not pay the note, as he had not gotten what he ordered, and that it looked as if Taft had tried to get rid of some of his own shares in the company. He offered to return these shares if Taft would return the note, but this offer was refused. It was sufficiently proven that the note was given for the specific purpose of purchasing new stock in the company, and that by subterfuge other stock was delivered to defendant; hence the consideration for the note failed.

It is claimed that error was committed in permitting Weiss to testify regarding the conversations he had with defendant not in the presence of plaintiff. These conversations were pursuant to the plan of Taft, the president, to secure purchasers for increased capital stock, and it is a fair inference that whatever was said by Weiss, the vice-president, was with the knowledge and consent of the president. In a letter written by Taft he states that he is "to finance the company." These

his request. Yoko denies that he ever mentioned it. She has
Emotions stating that the contents of the letter were "not to use
During the first showing of the Japanese digital print of the
Batman Unfriendship-Lovemaking "Virginia Slim ad, Jonny is
used for horrendous the mentions of the movies, and his acting
it specially for you, which is upon a Jonny writing on her dress.
This version of the Brookmation is corroborated by Yoko, who
testifies to the same effect and that this invitation was in the
defendant was after the first encounter with Yoko. There was
sufficient evidence to identify the girl in Japanese television
showing of the movie.

It is also shown that Kobayashi did not operate any
of the car stunts, but that Toki turned into the motorcycle
laundry film shoots of actually which film by the, while viewed
the burned eyes in the defendant. After defendant discovered
this to Kobayashi Toki that he could not get the case, he is that
not getting what he wanted, was then it happy or if left and
later in yet his at what of his you Sierra to the coupling. He
attempt to return those shows if Toki would return the cash, but
his offer was refused. It was publicity proven that the body
was given for the specific purpose of entertaining men group in
the company, and that by publicity those which are distinct to
defendant; hence the responsibility for the body falls.

It is claimed that Kobayashi qualified a variation
Toko to testify regarding the conversations and with defendant
not in the presence of plaintiff. These conversations were made
made to the plan of Toki. The testimony, as stated concerning
the Japanese media trade, and is to a fact interesting that
whatever was said by Toki, the representations, was with the
knowledge and consent of the defendant. In a letter written by
Toki he states that he is "a lesson one company." Jonny

conversations were part of the general scheme and transaction of financing the company and are part of the res gestae.

It is true that Weiss, while acting as agent of the corporation, was not the agent of the plaintiff personally; but what Weiss did in the transaction with defendant, under the direction of Taft as president of the corporation, would give Taft individually such knowledge as would bar any claim that he was an innocent holder in due course.

The verdict is not against the weight of the evidence, and as there were no errors upon the trial the judgment is affirmed.

AFFIRMED.

Matchett, J., concurs.

240 - 23075

(3170a)

PETER MALAKAUSKIS, for the use of Ambrozeyus Vizbaras, Individually and as Trustee,
Appellant,

vs.

PIONEER FIRE INSURANCE COMPANY OF AMERICA, a Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

230 Ill. 343

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Suit was brought on a fire insurance policy issued for $4,000 by the defendant to Tony Znuksta, as owner of a house at 6441 Knox avenue, Chicago. Attached to the policy was a mortgagee's clause running to Ambrozeyus Vizbaras, for whose use suit was brought, claiming an interest in the policy by virtue of a note for $1,000, secured by trust deed on the insured premises. Upon trial by the court it was claimed, among other defenses, that the suit was not brought within twelve months after the fire, as required by the policy. The court sustained this and found for defendant. Plaintiff appeals from the judgment thereon.

Lines 106 and 107 of the policy read thus:

> "No suit or action on this policy, for the recovery of any claim, shall be sustainable, in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

"The mortgage clause" attached to and made a part of the policy begins as follows:

> "Loss or damage, if any, under this policy, shall be payable to Ambrozeyus Vizbaras, Trustee, mortgagee (or trustee) or successor in trust, as interest may appear, and this insurance, as to the interest of the mortgagee (or trustee) only therein, shall not be invalidated by any act or neglect of the mortgagor or the owner of the within-described property, nor by any foreclosure or other proceedings or notice of sale relating to the property, nor by any change in the title or ownership of the property, nor by the occupation of the premises for purposes more hazardous than are permitted by this Policy."

Other provisions follow, which it is not necessary to quote. Beginning with line fifty-six of the insurance policy is this clause:

> "If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended hereto."

The salient question is: Did the provision of the policy limiting the time within which suit might be brought operate to bar plaintiff's suit, who was the mortgagee to whom the loss specified in the policy is made payable as his interest may appear? This question has already been answered by this court and by our Supreme court in construing a policy and mortgage clause precisely like those now before us. Queen Ins. Co. v. Dearborn Savings, Loan & Bldg. Co., 75 Ill. App. 371, affirmed in 175 Ill. 115. The policy and mortgage clause were construed to mean that:

> "The contract with the mortgagee shall include only such conditions as appear in such mortgagee clause or slip. The language of the policy, particularly in determining whether the liability is limited, is always to be strictly construed against the insurer. (Commercial Ins. Co. v. Robinson, 64 Ill. 265.) Under the well known rule of construction, 'Expressio unius est exclusio alterius,' the statement in this clause that certain conditions shall apply, but only as set forth in the mortgagee slip, excludes all conditions not contained therein. The mortgagee slip in this case contains no such conditions as are claimed by the defendant. Had it been desired to impose the obligation on the mortgagee to make proof of loss, that requirement should have been inserted in the conditions applicable to the mortgagee.
>
> "That we have said applies equally to the limitation as to bringing suit within twelve months. The conditions in the body of the policy, by virtue of the clause above cited, are applicable solely to the insured, as distinguished from the mortgagee."

In the Appellate court opinion attention is called to the provision at line fifty-six of the insurance policy that "the conditions hereinbefore contained shall apply," etc., and it is

held that this excluded the application of subsequent provisions, among which were the provisions at lines 106 and 107, limiting the time of commencing suit. The positions of these provisions in the policy were identical, even to the numbered lines, to those in the policy under consideration. Following this decision we hold that the trial court was in error in finding that the mortgagee was barred by the provision of the policy limiting the time within which suit was brought. This disposes of most of the points argued by defendant.

It is urged that there was insufficient proof of the identification of the insurance policy, the amount of damages caused by the fire, and the identity of the owner and holder of the notes and trust deed. While there is some obscurity in the evidence on these points, they can probably be made clear on the next trial.

There was evidence that Tony Knuksta assigned his interest in the property to Peter Malakauskis, and upon trial leave was properly given to make Malakauskis the nominal plaintiff instead of Knuksta. If this resulted in any variation in the statement of claim as to the names of the parties who signed the notes and other papers, this may be corrected by amendment.

Plaintiff has moved in this court to have this cause referred to a master to take evidence and find the amount due the mortgagee under the policy. We find no precedent for such a motion in a case of this kind. The supporting cases cited are chancery cases. The motion will be denied. Upon the new trial the amount of the interest of the mortgagee, if any, should be proven in the usual way.

For the reasons above indicated, the judgment of the Municipal court is reversed and the cause is remanded.

REVERSED AND REMANDED.

Matchett, J., concurs.

289 - 28124

H. VAN DE VEIRE, Appellee, vs. KOENIG DAIRY, INC., a Corporation, DANIEL JEFFRIES and OTTO WOHLT, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from an adverse judgment in an action in forcible entry and detainer. We have heretofore stricken from the record in the bill of exceptions. There is left therefore for consideration only assignments of error touching the law record.

In the absence of a bill of exceptions the presumption is that the evidence justified the judgment. Hawthorne v. Cartier Lumber Co., 121 Ill. App. 494.

Only three points are made in defendant's brief: (1) If it should appear that plaintiff is entitled to the possession of only part of the premises claimed, the judgment should be for that part only. As the evidence is not judicially before us we must assume that plaintiff was properly found to be entitled to possession of the premises described in the judgment. (2) A complaint in writing is necessary in an action of forcible detainer. This is true, and the record shows that a complaint in writing was filed. (3) If a judgment against two defendants in a forcible detainer is erroneous as to one it must be reversed as to both. Without the evidence before us, we cannot say that the judgment was erroneous as to any one of the defendants, but must assume that it was properly proven that all of them were guilty

of unlawfully withholding from the plaintiff the possession of the premises.

Certain other points are suggested in argument which under our rules we are not required to notice, although we do so.

It is said the record shows that the complainant originally described the premises as "garage situated in the rear of lot known as 1817 North Kimball avenue," whereas the judgment is for the "entire premises and garage in rear of 1817 North Kimball avenue." It is true that the judgment must correspond to the complaint, but the record shows that on motion plaintiff was granted leave to amend the description of the premises in the complaint so as to read "entire premises and garage in rear of 1817 North Kimball avenue." Thus the complaint as amended and the judgment are in harmony.

Objections to the insufficiency of the complaint in an action of forcible detainer must be made by motion to quash before trial. Such defect cannot be taken advantage of for the first time in the court of review. Leary v. Pattison, 66 Ill. 203; Center v. Gibney, 71 Ill. 557.

Some argument is made as to the judgment against three defendants upon the assumption that the record shows that two of them are entitled to a portion of the premises. We can not indulge in such an assumption when the evidence is not before us.

There is no variance between the judgment with respect to the defendants nor the description of the premises and the amended statement of claim.

No sufficient reason is presented to reverse the judgment and it is therefore affirmed.

AFFIRMED.

Matchett, J., concurs.

of unlawfully withholding from the jurisdiction the assessment of the province.

Overall other matters are apparent on appeal which make our final view on the not contested issues, although we do so.

It is with the proper court that the constitutionality challenge concerning the provisions of "Quebec citizens in the year of his leave or 1967 with dubious status." whether the judgment is for the Indian corporate and grants in year of 1967 Metis Tribal Council." is a clear fact the judgment must ensure to the contrary, but the issues could that no matter plaintiff was injured Court is about the jurisdiction in the province in the constitutional or of is full "action provisions the judge in year of 1967 in its tribal citizen." that the area plaintiff on contract and the judgment for it Canada.

Objections to the jurisdiction of the question on matter or facility factors must be made by motion to quash before trial. Some defect cannot be taken advantage of for the first time in the course of appeal. Lamey v. Gallinger, 24 O.R. 301; Jackson v. Gibson, 21 O.R. 329.

Some argument is made as to the jurisdiction against these defendants with the consequence that the issue arose that of time was critical to a question of the jurisdiction. We can not indulge in such an analysis that the evidence is not before us.

There is no evidence between the jurisdiction with respect to the defendants nor the association or the province nor the amended pleadings of claim.

No additional reason is presented to reverse the judgment and it is therefore affirmed.

Judgment, J., concurs.

28232

397 - 28232

THOMAS F. MEADE,
Appellee,

vs.

JOSEPH P. GEARY et al.,
Appellants.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

Editor: In working this abstract, refer to docket entries

MR. PRESIDING JUSTICE McSURELY
DELIVERED THE OPINION OF THE COURT.

280 I.A. 042

This is a proceeding similar to that discussed and decided in McCarthy v. Geary, 28229, opinion filed this day. 229 Ill. App. 414 That is said in that opinion is applicable to this case, and we refer to that for the reasons for the judgment entered herein.

Upon petitioner's motion to strike there was filed not only the affidavit of the reporter who took the stenographic notes of these proceedings but also an affidavit by Gilbert C. Cater, the attorney for the respondents, which was not in the Geary case. He says that he had charge of a number of certiorari cases in the Circuit court and that, in his opinion, the decision in Funkhouser v. Coffin, 301 Ill. 257, made it necessary to include in the return made in each of said cases the testimony given at the hearing, and that he thereupon notified the secretary of the Commission of this necessity and that the secretary, as affiant is informed, ordered the reporter to write up the shorthand notes of the evidence taken at the hearings.

In this case the writ of certiorari was dated August 2, 1921, and the return filed October 8, 1921. The abstract does not show when the writ was served.

For the reasons stated in opinion filed in 28229, the order and judgment of the Circuit court, and each part thereof, is reversed and the cause is remanded for further proceedings consistent with what we have said in these opinions.

REVERSED AND REMANDED.

Matchett, J., concurs.

167 - 28002

JOHN LARSON, Appellee, vs. ALBERT I. APPLETON, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the Municipal Court of Chicago in favor of John Larson, appellee, in the sum of $2250 for commissions claimed to have been earned by him in obtaining a purchaser for certain property in Chicago at the instance of Albert I. Appleton, appellant.

The statement of claim is as follows:

"The defendant, Albert I. Appleton and the plaintiff, John Larson, on or about the 12th day of October, 1920, entered into an agreement whereby the defendant employed the plaintiff to obtain for said defendant a person who would enter into a contract for the purchase of certain real property, viz: property located at the Northeast corner of Harper avenue and Hyde Park boulevard, in the City of Chicago, County of Cook and State of Illinois, at a price acceptable to said defendant, and said defendant in and by said contract promised and agreed to pay to plaintiff for his services in obtaining such a person, an amount equal to 3 per cent of the amount of the selling price of said property, which should be agreed upon between defendant and such person, and the plaintiff states that he obtained such a person, who agreed to purchase said property from said defendant at a price of Seventy-five Thousand Dollars ($75,000), and said defendant accepted said purchaser and entered into a written contract to said purchaser at said price, and this plaintiff says that thereupon defendant became and now is indebted to plaintiff in the sum of Twenty-two Hundred and Fifty Dollars ($2,250), which amount is now due plaintiff from defendant."

The affidavit of defense is, in substance, as follows:

That defendant

"never employed the plaintiff to obtain a purchaser of the real estate described in plaintiff's statement of claim and did not agree to pay Larson for his services 3 per cent of the amount of the selling price; (2) that defendant did not own the real estate in question, but that said real estate

147 - 30013

JOHN LAWSON,

Appellee,

vs.

ALBERT I. GRAINER,

Appellant.

APPEAL FROM MULTNOMAH COUNTY

OF OREGON.

MR. JUSTICE BOSCHKE DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the amount of $1,000 for commissions claimed to have been earned by the plaintiff, a brokerage for certain property in Oregon, of the defendant, Albert I. Grainer, appellant.

The statement of claim is as follows:

"The defendant, Albert I. Grainer and the plaintiff, John Lawson, on or about the 5th day of October, 1929, entered into an agreement whereby the defendant authorized the plaintiff to obtain for said defendant a person who would enter into a contract for the purchase of certain real property, viz: property located at the Northeast corner of Harper avenue and High Park boulevard, in the City of Portland, County of Cook and State of Illinois, at a price acceptable to said defendant, and said defendant in and by said contract promised and agreed to pay to plaintiff for his services in obtaining such a person, an amount equal to 5 per cent of the amount of the selling price of said property, which should be paid upon delivery of said deed, and the plaintiff states that he obtained such a person, who agreed to purchase said property from said defendant at a price of Seventy-five Thousand Dollars ($75,000), and said defendant accepted said purchaser and entered into a written contract to sell said property to said purchaser, and that plaintiff says that thereupon defendant for some and now is indebted to plaintiff in the sum of Twenty-five Hundred and No/100 Dollars ($2,500), which amount is due and plaintiff from defendant."

The affidavit of defense is, in substance, as follows:

That estimated

"never employed the plaintiff to obtain a purchaser of the real estate described in plaintiff's statement of claim and did not agree to pay plaintiff for his services 5 per cent of the amount of the selling price; (2) that defendant did not own the real estate in question, but that said real estate

was owned by the Beach Theatre Company, an Illinois corporation, and that defendant only owned stock in said company; that defendant proposed only to sell his stock; that defendant did enter into a contract with one Chin Foin to sell the said real estate, but that the contract did not express the real agreement of the parties, which was to sell the stock; that Chin Foin refused to carry out said agreement, and that no sale was made of the real estate or any other property by means of said Larson; that defendant's agreement with Larson was that no commission should be paid to Larson unless the contract was consummated and a sale was made; that no sale was made and no commission earned by him; (3) that at the time of the transaction in question Larson was unlawfully engaged in the business and acting in the capacity of a real estate broker in the City of Chicago, in violation of the ordinance of said city adopted April 7, 1920, and without having first obtained a real estate broker's license as required by said ordinance; (4) that the contract between Foin and defendant was not a mutual contract and is incapable of being enforced by each of the parties thereto against the other, and is void and of no effect."

A jury was waived and the cause was heard by the court. The finding of the court was in favor of appellee in the sum of twenty-two hundred and fifty dollars.

Counsel for appellant urges as his first assignment of error that appellee, at the time of the transaction, was engaged in the real estate brokerage business without a license in violation of the ordinance, and, therefore, is not entitled to recover commissions. The ordinance in question was adopted April 7, 1920, and went into effect May 7, 1920. It provides a fine of "not less than Twenty-five Dollars ($25) nor more than Two Hundred Dollars ($200), and every day that a violation of the ordinance shall occur shall constitute a separate and distinct offense. It is admitted that at the time of the transaction in question appellee did not have a broker's license as required by the ordinance.

The evidence shows that appellee had been engaged in the real estate business for eight or ten years up to the time that he entered the army during the war; that he was in the service about a year and three-quarters; that after he left the service he "started manufacturing a little apparatus called Fumidore," and "worked at that sometime in the early part of the year 1920;" that later in

the year 1920, "he was doing some real estate business" as an employee of John R. Magill & Company; that the transaction in question with appellant was the only sale that he made in the year 1920, on his own account. Appellee testified that he had a business card in January, 1921, but that he did not remember whether he handed the card to appellant at the time of the transaction with him; that when he was negotiating with appellant he had his office with John R. Magill & Company, 35 North Dearborn Street. Appellant testified that appellee gave him a business card and that it stated that appellee was in the business of real estate investments, 30 North Dearborn Street. The card was introduced in evidence by appellant. Appellant also testified that when appellee came to him with the purchaser's check for $2500 as "earnest money" appellee said he would hold the check "as broker." Appellee testifies that he said that he would hold the check because the $2250 belonged to him. Pace, a witness for appellant, testified that he knew appellee was in the real estate business in 1920; that he had several deals with him, and "so far as" he knew, appellee "was acting in his own name;" but that "he did not know of his own knowledge" what appellee's "business was with Magill & Company or any other man." John Larson, a brother of appellee, testified that "so far as " he knew, appellee was selling and leasing property in Chicago in the year 1920, and that he heard him talking of selling one building; but John Larson did not testify whether appellee was in business for himself or working for others. Appellee testified that he was not acting as an independent real estate agent in 1920, and there is no positive evidence to the contrary. Appellee was asked by counsel for appellant if he had not taken part in negotiating leases in 1920, and appellee replied that he did not remember. There is no evidence that appellee did take part in negotiating leases in 1920 as an independent real estate agent. His testimony that the transaction in question with appellant was the only sale he had

the year 1900, "he was doing good real estate business" in an
employee of John R. Magill & Company; that the transaction in
question with applicant was the only sale that he made in the year
1900, on his own account. Applicant testified that he had a business
card in evidence, 1911, but was on its back reading "Notary Public"
handed him card by applicant at the time of the transaction with
him; that when he was negotiating with applicant he had his office
with John R. Magill & Company, 11 North Dearborn Street. Applicant
testified that applicant gave him a business card and then it stated
that applicant was in the business of real estate investments, 30
North Dearborn Street. He said was interested in selling to
applicant. Applicant also testified that when applicant came to him
with the partnership' deed for 30000 on "account money" applicant said
he would hold the money "at trustee." Applicant testified that he
said that he would hold the check because the 30000 belonged to him.
Each, a witness for applicant, testified that he knew applicant was
in the real estate business in 1900; that he had several conversations
him, and "on the" he knew, applicant "was getting it his own money;"
but that "he did not know of his own knowledge" that applicant's
"business was with Magill & Company or any other man." John Lorenz,
a banker of Chicago, testified that "on the " he knew, applicant
was selling and leasing property in Chicago in the year 1900, and
that he heard him talking of selling one building; that John Lorenz
did not testify whether applicant was in business for himself or
working for others. Applicant testified that he was not acting as
an independent real estate agent in 1900, and there is no positive
evidence to the contrary. Applicant was called by counsel for
applicant if he had not taken part in negotiating leases in 1900,
and applicant replied that he did not remember. There is no evi-
dence that applicant did take part in negotiating leases in 1900 as
an independent real estate agent. His testimony that the
transaction in question with applicant was the only sale he had

made in the year 1920 on his account, stands uncontradicted.

During the time that appellee worked for John R. Magill & Company as their employee, it was not necessary for him to have had a license as a real estate broker. It has been held by this court that the ordinance does not apply to mere employees of brokers, though they are paid for their work on the basis of a certain percentage of the commissions. Thorpe v. Weber et al., 191 Ill. App. 2; Kappes v. Bacon, 209 Ill. App. 296. It has also been held that the provisions of an ordinance forbidding a real estate broker to engage in business without a license applies "only to persons making the sale or negotiation of sales of real estate of others a business or occupation, and not to one who is not in the business, but negotiates a single sale." O'Neil v. Sinclair, 153 Ill. 529, 531.

On the evidence in this case, although it appears that appellee was engaged in the real estate business for eight or ten years prior to his entering the army during the war, it is not shown that he was an independent real estate agent at the time of the transaction with appellant. He quit the real estate business to enter the army, where he remained nearly two years. After he left the service in the army he did not resume the real estate business immediately but engaged in a small manufacturing business for a while in 1920. Later in 1920 he was employed by the real estate firm of John R. Magill & Company. He was acting as an independent real estate agent in the transaction with appellant, but this was the only transaction in which he was engaged for himself from the time that the ordinance was in effect, namely, May 7, 1920, to the end of the year 1920. The transaction with appellant was within that period. We are of the opinion that the trial court did not err in holding that appellant was not engaged in the real estate business within the meaning of the ordinance.

made in the year 1960 on his account, stands unpublished.

During the time that appellee worked for John K. Magill & Company as their employee, it was not necessary for him to have had a license to sell real estate. It has been held by this court that the activities does not qualify a mere employee of brokers, though they are made for their work on the basis of a correct knowledge of the commissions. Thorne v. Baker et al., 241 Ill. App. 8; Kenney v. Brown, 177 Ill. App. 320. It has also been held that the provisions of an ordinance forbidding a real estate broker to engage in business without a license applies "only to persons making the sale or negotiation of sales of real estate of others a business or occupation, and not to one who is not in the business, but negotiates a single sale." Fickel v. Finkelly, 177 Ill. App. 221.

On the evidence in this case, although it appears that appellee was engaged in the real estate business for eight or ten years prior to his entering the army during the war, it is not shown that he was an independent real estate agent at the time of the transaction sub judice. In fact the real estate business to which the army, since he did not resume the real estate business immediately but engaged in a small manufacturing business for a while in 1946. Later in 1948 he was employed by the real estate firm of John K. Magill & Company. He was acting as an independent real estate agent in the transaction with appellant, but this was the only transaction in which he was engaged for himself from the time that the ordinance was in effect, namely, May 7, 1948, to the end of the year 1948. The transaction with appellant was within that period. We are of the opinion that the trial court did err in holding that appellant was not engaged in the real estate business within the meaning of the ordinance.

Counsel for appellant contends that appellant never employed appellee to obtain a purchaser for the property described in the contract; that the proposed purchaser, Chin Fein, employed appellee to buy the property of appellant for him; that appellee found out from a tenant on the premises that appellant was the owner of the building and wrote to appellant; and that appellant called up appellee and an appointment was made. We are unable to agree with counsel for appellant in his interpretation of the evidence. It does not matter how appellee got into communication with appellant, the fact is, that after they met, appellee was employed by appellant to procure a purchaser and he did procure one. Appellee's commissions for his services were agreed on in the written contract of sale between appellant and the proposed purchaser, Chin Fein. The evidence shows unquestionably that appellant did employ appellee to obtain a purchaser for the property in question.

Counsel for appellant further contends that the contract between appellant and the proposed purchaser, Chin Fein, was not an enforceable contract, and for that reason appellee is not entitled to recover his commissions. Counsel for appellant asserts in this connection that the evidence shows that appellee knew that the title to the real estate described in the contract between appellant and the proposed purchaser, Chin Fein, was not vested in appellant but in the Beach Theatre Company, a corporation. Appellant testified that he told appellee that the company owned the building and leasehold for 99 years, and that he owned 62 per cent of the stock of the company. Appellee testified that at the time he began negotiations with appellant, appellant told him that he owned the property; that when the contract was drawn up appellant explained to him that he, appellant, owned a corporation and was going to sell the corporation and the leasehold. But it is immaterial whether appellee knew or did not know that the company and not appellant

Counsel for appellant contends that appellant never employed appellee to obtain a purchaser for the property involved in the contract; that the proposed purchaser, Chin Yoin, employed appellee to buy the property of appellant for him; that appellee found out from a tenant on the premises that appellant was the owner of the building and wrote to appellant; and that appellant called up appellee and an appointment was made. We are unable to agree with counsel for appellant in his interpretation of the evidence. It does not matter how appellee got into communication with appellant, the fact is, that after they met, appellee was employed by appellant to procure a purchaser and he did produce one. Appellee's commissions for his services were agreed on in the written contract at Six Thousand Dollars and the proposed purchaser, Chin Yoin. The evidence fairly establishes that appellant did employ appellee to obtain a purchaser for the property in question.

Counsel for appellant further contends that the contract between appellant and the proposed purchaser, Chin Yoin, was not an enforceable contract, and for that reason appellee is not entitled to recover his commissions. Counsel for appellant asserts in this connection that the evidence shows that appellee knew that the title to the real estate described in the contract between appellant and the proposed purchaser, Chin Yoin, was not vested in appellant but in the Lucky Theatre Company, a corporation. Appellant testified that he told appellee that the company owned the building and leasehold for 20 years, but did not know if he had any of the stock of the company. Appellee testified that at the time he began negotiations with appellant, appellant told him that he owned the property; that when the contract was first drawn up appellant suggested to him that he, appellant, owned a corporation and was going to sell the corporation and the leasehold. But it is immaterial whether appellee knew or did not know that the company and not appellant

owned the building and the leasehold. A written contract was entered into between appellant and the proposed purchaser, Chin Yoin, and the provisions of the contract are controlling. Berry v. Hewitt, 210 Ill. App. 170. The contract was never performed.

In his contention that appellee is not entitled to his commissions unless appellant and the proposed purchaser entered into a valid, enforceable contract, counsel for appellant maintains that as appellant had no title to convey, the contract was not an enforceable contract. Counsel develops his contention by arguing that in order that a contract may be valid and enforceable it must be such a contract as can be mutually enforced by specific performance; and that as Chin Yoin could not "enforce performance" against appellant because appellant did not have title to the property, and could not "enforce performance" against the corporation because it is not a party to the contract, the contract is not mutual, and, therefore, is not a valid, enforceable contract. In other words, the contention amounts to this, that mutuality of obligation and mutuality of remedy must concur in order that a valid, enforceable contract may exist. That may be true as to the test for specific performance in this state, but it is not true as to the test for a valid, enforceable contract. Counsel for appellant cites cases, which he contends, are similar to the present case, and in which specific performance was denied for want of mutuality of the remedy of specific performance. The cases are not applicable for the reason that counsel's contention is wholly unsound. The issue in the present case is not whether the remedy of specific performance will lie, but simply whether the present contract, in a legal sense, is valid and enforceable. We are not concerned with the controversy as to what may be the proper remedy for enforcement. It is too obvious to require discussion that the test of the validity of a contract is not dependent upon the question whether it can be enforced

mutually by specific performance. The enforceable contract which the law contemplates in a case such as the present, is a contract that is enforceable either in law or equity, and is not confined to a contract that is only enforceable in equity by specific performance. A contract may be valid and yet not be capable of being enforced by specific performance. There may be an adequate remedy at law, although not a remedy in equity by specific performance. In fact, specific performance may be denied because there is an adequate remedy at law, and it may also be refused in this state because of the lack of mutuality of the remedy of specific performance.

Counsel for appellant has apparently misconceived the meaning of the term "mutual" as applied to contracts. His idea seems to be that if there is not mutuality of the remedy of specific performance, then the contract is not enforceable within the meaning of the rule. Mutuality of contract does not mean that each party shall have the same remedy. (13 Corpus Juris, p. 333; 6 Ruling Case Law, Section 97, pp. 691, 692.) The principle that contracts must be mutual, must bind both parties or neither, does not mean that in every case each party must have the same remedy for a breach by the other. Covenants may lie against one, where only assumpsit can be maintained against the other. The mutuality required is that which is necessary for creating a contract enforceable on both sides in some manner, but not necessarily enforcable on both sides by specific performance. Northern Central Ry. Co. v. Walworth, 193 Pa. St. 207, 213; Eckstein v. Downing, 64 N. H. 248, 260.

The contract in the present case between appellant and Chin Foin is a valid contract which is mutually obligatory on both parties. That Chin Foin may not have the particular equitable remedy of specific performance is immaterial. Appellant accepted Chin Foin as a purchaser and they both signed a written contract

mutuality by specific performance. The enforceable contract which the law recognizes is a mere nudum pactum, in a contract that is enforceable either in law or equity, and is one wherein the promisee's duty is well relative to equity by specific performance. A contract may be valid and yet not be capable of being enforced by specific performance. There may be an adequate remedy at law, although not in strict to equity by specific performance. In fact, specific performance may be denied because there is an adequate remedy at law, and so may also be refused in this case because of the loss or mutuality of the remedy of specific performance.

Denial for equitable relief because of the term "mutual" is applied to contracts. It has seemed to be that if there is not mutuality of the remedy of specific performance, then the contract is not enforceable within the meaning of the rule. Mutuality of remedies does not mean that both parties shall have the same remedy. (In Morgan Davis, p. 474; 2 Minn. Pers. Law, Section 87, pp. 474, 475.) The principle that contracts must be mutual, means that both parties be bound, but it does not mean that in every case each party must have the same remedy for a breach by the other. Sometimes they do, sometimes not, where such remedies are to maintain against the other. The mutuality required is that and is necessary for enforcing a contract unless upon both sides in some manner, but not necessarily enforceable on both sides by specific performance. Thompson Lighting Co. v. Thompson, 193 Ga. 19, 20; Burnette v. Mining, Co. 2, Ga. App. 1.

The mutuality in the remedies does because equitable relief which is a valid contract which is mutually obligatory on both sides. That does not have the particular relief specific of specific performance is immaterial. Nonetheless without that no a performance and they both signed a written contract

of sale in which it was recited, among other things, that Chin Fein had paid $2,500 "as earnest money." Appellee did all that the law required of him, to earn his commissions. He procured a purchaser who entered into a valid, enforceable contract of sale with appellant. Where the owner of property accepts, without fraud or deception, the purchaser produced by the broker employed by the owner to sell the property, and a valid, enforceable contract of sale is made, the broker is entitled to his commissions, notwithstanding the purchaser fails to carry out the contract. Fox v. Ryan, 240 Ill. 591. The right of the broker to his commissions is not affected if one or both of the parties subsequently refuse to carry out the contract. Easter v. Newberry, 170 Ill. App. 494, 496; Springer v. Orr, 82 Ill. App. 558, 565; Fox v. Ryan, supra.

The case of Bragowski v. Grohocki, 185 Ill. App. 491, cited by counsel for appellant, is clearly not in point. The broker in that case procured only one of two tenants in common to sign the contract with the defendant for the exchange of lands; and the proper proof was not made that the person not signing the contract, was ready and willing to perform.

Counsel for appellant further contends that the trial court erred in not allowing him to show that the proposed purchaser, "Chin Fein, refused to carry out the contract and that it never was in fact carried out." According to the views we have already expressed, evidence on that question was immaterial. The court ruled correctly in excluding the evidence. Fox v. Ryan, supra; Easter v. Newberry, supra.

For the reasons stated, the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

of this to which it was applied, among other things, that "the
jury had paid $4,000 for nothing worth anything." Upholding the
the law applied to the

a mortgagor who conveyed land to a wife, notwithstanding compliance of
with all equitable, there was proof of primary security, without
fraud or duress, the grantee procured by the husband acquiescence
by the owner to sell the property, and a valid, substantial
trust of wife in mind, the husband is entitled to his commissions,
without burdening the purchaser fully to carry out his contract.
See v. Jones, 240 III. 383. The claim of the broker to his
commissions is not affected if one or both of the parties
repudiate or refuse to carry out the contract. Lobby v. McCormick,
47 III. App. 101, 404; Hartmann v. Cox, 86 III. App. 478, 481;
See v. Jones, supra.

The case of Lamoreaux v. Kennedy, 187 III. App. 73,
relied by counsel for appellant, is clearly not in point. The
reason is that the premises only one of the contracts in question in
also the contract with Mr. Kennedy for the exchange of lands
and the proper proof was not made that the parties had signed the
contract, and fraud and validity in question.

Counsel for appellant further contends that the trial court
erred in not allowing him to show that the personal property, "Ohio
Pete," refused to carry out the contracts and that it never was in fact
delivered by. In reviewing in the views we have already expressed, evi-
dence on that question was immaterial. The court could correctly in
excluding the evidence. See v. Jones, supra; Lobby v. McCormick,
supra.

For the reasons stated, the judgment is affirmed.

Affirmed.

Dunn, P. J., and Barnett, J., concur.

249 - 28084.

ISAAC ELLIASON, Appellant,	)	
vs.	)	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
PHILLIP PASKIND, Appellee.	)	

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Isaac Elliason, appellant, from a decree of the Circuit Court of Cook County, Illinois, confirming the report of the master in a suit for dissolution of a mercantile partnership, and an accounting between appellant and Phillip Paskind, appellee. The court entered a decree dissolving the partnership and finding that the profits amounted to $7260.75.

The only objection urged on this appeal by appellant, is that in making the accounting and arriving at the profits, the court based the estimate on an inventory showing the merchandise on hand at the cost price to amount in value to $27,061.36, whereas the court "should have taken what was then the replacement value or market value of the merchandise;" and that if the court had taken the latter value a loss instead of a profit would have been shown.

Counsel for appellant contend that the rule is well established that in an accounting on a dissolution of partnership, the replacement value of the stock, that is to say, the actual value of the stock at the time of the dissolution, should form the basis for determining the profit or loss. Counsel offered to show that at the time of the dissolution, the actual value of the stock was from 35 to 40 per cent less than the cost price.

The answer to the objection of counsel for appellant is that in our opinion the master and the court correctly found

that the cost price of the stock, amounting to $27,061.35, was agreed upon by both appellant and appellee as a basis for the audit of the books.

The evidence shows that appellant and appellee were engaged in the mercantile business at two stores in Chicago, one at 1755 West Division Street, and the other at 442 West Division Street; that appellant, appellee and one Hodes took an inventory at 1755 West Division Street, and that appellee and a brother of his took an inventory at 442 West Division Street; that the total figures of the two inventories amounted to $27,061.35, and that this was the amount that constituted the basis on which a public accountant made his audit. The public accountant, Bernard Metal, an employee of Thulin & Company, testified that in arriving at his figures he took "note of the merchandise on hand as of December 31, 1920 (the date of the dissolution), amounting to $27,061.35." He further testified as follows:

> "I did not want to go into the inventory sheets because we were instructed to make the audit as brief as possible consistent with accuracy, so I got Mr. Paskind and Mr. Ellisson together. They were both watching me and I took the total figures of both inventories and asked them if those figures were correct, and they both told me unqualifiedly and without restriction that the figures were correct for both stores. They said those figures were taken at the cost price; both of them said that. I would not proceed with the audit until I had those figures because the audit would have been worthless if there had been any contention as to the inventories."

The accountant Metal was recalled and testified as follows:

> "I first became acquainted with complainant about February 16, 1921, at 442 Division. I told him that I had been sent there by Thulin & Co. to audit the books to determine what the profits were from September 3, 1919, to December 31, 1920. Complainant said yes, that they had an agreement that an auditor was to come out, and I asked complainant if he would let me see all the books, records and papers and everything else and he showed me and handed me practically everything that has been shown here and I asked about the details of the inventories of the two stores and

that its cost value of the stock, amounting to $27,111.32, has actually gone up. Both applicants are willing to write the 12% audit of the bonus.

The witnesses gave their qualifications and expertise were adjudged in the amounts of two dollars in income, was at 17DB Jail Division Fund, and the other at 442 Jail Division Fund. Both qualified, qualified and are today both as executory at 1?? Jail Division Fund, and that qualified and a trustee of his such an inventory at 442 Jail Division Fund. That the total figures of the two inventories amounts to $27,111.32, and that this was the amount that qualified the funds on which a public accountant made his audit. The public accountant, Donald Wood, an employee of Phillip & Company, testified that in preparing the figures he took "note of the merchandise on hand as of December 31, 1968 (the date of the dissolution), amounting to $27,001.32." Mr. Barton testified as follows:

> "I did not meet to go into the inventory means co-
> mmon so were interested in make the audit as brief as
> possible consistent with economy, so I put Mr. Hawkins
> and Mr. Williams in charge. They were both admitted to
> said / then the total figures of both inventories and asked
> them if these figures were correct, and they both told me
> unqualifiedly and without reservation that the figures
> were correct for both stores. They said these figures
> were taken on the same price; both of them said that.
> I would not proceed with the audit until I had from fin-
> ding inside the audit work have been certain of that
> had been any contention as to the inventories."

The accountant then revealed the tentative as follows:

> "I first became acquainted with complainant about Jan-
> uary 16, 1971, at 442 Division. I told him that I had
> been long there by Phillip & Co. to audit the books in re-
> ference that the profits were from December 1, 1970, to
> December 31, 1970. Complainant said he, that was had an
> agreement that an auditor was to come out, and I asked com-
> plainant if he would let me see all the books, records and
> papers and everything else that he showed me and tended to
> establish ownership. He had two, some kind but I didn't
> know the details of the inventory of the two stores and

Mr. Paskind came in and I inquired specifically concerning these inventory figures and asked each of them directly and both of them jointly on what basis these inventories had been made and was told that the opening inventory was taken on the basis of what they each jointly considered the merchandise worth at the time they took it over, September 3, 1919, and that the closing inventories were taken at cost. I asked them what they meant by cost, separately, then jointly, to make sure that I understood it, because I realized that if I did not get that straight I might just as well not have an audit, and complainant told me, his exact words, if I remember correctly were: 'We know what we paid for that stuff so we know what it cost,' and based on my questions and the answers they gave me, I assumed that both of the closing inventories were taken on the basis of what the goods cost them. I asked directly whether they each understood what the purpose of that audit was and they both agreed with me that they understood that I was there for the purpose of determining what the profits from the partnership were from September 3, 1919, to December 31, 1920."

The audit by Metal is admitted to be correct.

Appellee testified that the audit was made on the replacement or actual value of the stock at the time of the dissolution. Appellant admitted that the testimony of Metal, the accountant, was correct, but testified that when the phrase "cost price" of the stock was used, it meant the "cost price if we had to go out on the market that day and buy it."

We do not accept the testimony of either appellee or appellant on the issue in question as accurate, but we are of the opinion that the testimony of Metal, the public accountant, gives a correct version of the facts.

Counsel for appellee contend that the agreement between appellant and appellee, called a partnership, is not a partnership in law but is merely a contract of employment which provides that appellee was to share one-half of the profits, but does not provide that he was to share in any losses; and that being a contract to share only in the profits, the accounting should not have been made according to the rule governing a dissolution of a partnership, but that the method adopted was

correct. In the view we have taken of the case, it is unnecessary to determine this question.

For the reasons stated, the decree is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

[illegible]. In the view we have taken of the case, it is unnecessary to determine that question.

For the foregoing reasons, the decree is affirmed.

[illegible].

[illegible], J., [illegible], [illegible], [illegible].

299 - 28134

SILVOS FRAPOLLY, Appellee, vs. MORRISON HOTEL COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Morrison Hotel Company, appellant, from a judgment in the Municipal Court of Chicago in favor of Silvos Frapolly, appellee, for $30.

The action was brought by appellee to recover wages stated by him to amount to $35, and claimed to be due him from appellant for services as a waiter.

The claim was resisted by appellant on the ground that appellee had lost six "checks;" that under the rules signed by appellee at the time of his employ, appellant was entitled to charge $5 for each of the lost "checks," or $30 for the six "checks" and that this charge of $30 covered appellee's claim for wages.

Two questions are raised by appellant:

First: That the rule of appellant charging a waiter $5 for "Losing a check" provided for liquidated damages and not for a penalty.

Second: That the judgment is manifestly against the weight of the evidence.

The undisputed facts are as follows: Appellee was employed by appellant as a waiter in appellant's restaurant at a salary of $60 a month. In the management of its business appellant had in force a set of rules for the regulation and

direction of its waiters. When a waiter was employed he was required to sign an agreement "to abide by all of the" rules. Appellant also had a system by which it issued to the waiters when they "went on duty" cards or "checks" consisting of three parts, one of which was a stub for the guests called the "Guest's Receipt," another a stub for the waiter called the "Waiter's Receipt," and the other was for the cashier of appellant. The three parts were numbered with the same number. Each day upon reporting "for duty" the waiters received a certain number of "checks" for which they signed in a book kept for that purpose. On going "off duty," the waiters returned the unused "checks," and were entitled to a receipt for them. When a guest was served he paid the waiter and received the part of the "check" called the "Guest's Receipt." The other parts of the check were delivered by the waiter to the cashier, who stamped each part "Paid," returned to the waiter the part called the "Waiter's Receipt," and kept the remaining part.

The rules of appellant which have been referred to were printed on a card containing the following heading:

> "IMPORTANT. Waiters must not drink intoxicants while 'on duty' unless they first procure a written order from head waiter for same. Any waiter getting a drink or a cigar on a check for himself or any other employee will be fined $1.00 for each offense. While we dislike very much fining anyone, we are compelled to do so in some instances in order to have waiters live up to our rules, which are as follows."

Among the rules is Rule 2, the part of which relating to "Losing check" is applicable to the present case. It is as follows:

> "Rule 2. Losing a check - $5.00. Failure to turn in check book, checks or waiters' table numbers - to checker - when going off duty - $1.00 for each offense."

distribution of the waiters. When a waiter was required he was required to sign an agreement "to abide by all of the" union. Applicants also had a system by which it issued to the waiters when they "went on duty" cards or "checks" consisting of three parts, one of which was a slip for the guests called the "guest's receipt," another a slip for the waiter called the "waiter's receipt," and the other was for the counter of applicant. The three parts were numbered with the same number. Each day upon reporting "for duty" the waiter received a certain number of "checks" for which they signed in a book kept for that purpose. On leaving "off duty," the waiters returned the unused "checks," and were entitled to a receipt for them. When a guest was served he paid the waiter and received the part of the "check" called the "guest's receipt." The other part of the check was retained by the waiter to the counter, who stamped each part "paid," returned to the waiter the part called the "waiter's receipt," and kept the remaining part.

The rules of operation which have been referred to were printed on a card containing the following in bold:

> "IMPORTANT. Waiters must not drink intoxicants while 'on duty' unless they first procure a written permit from head waiter for same. Any waiter getting a drink or a cigar on a check for himself or any other employee will be fined $1.00 for each offense. While we dislike very much fining anyone, we are compelled to do so in case insubordination in order to have waiters live up to our rules, which are as follows:

Among the rules is Rule 3, the part of which relating to "loaning checks" is applicable to the present case. It is as follows:

> "Rule 3. Loaning a check - $2.00. Refusing to turn in check book, checks or waiter's badge upon request - discharge - when notice off duty - $1.00 for each offense."

At the time of his employ appellee signed the agreement to "abide by all of the" rules, including Rule 2.

The principal issue of fact involved in the case is whether appellee lost the six "checks" in question. He denies that he lost them.

Appellant contends that a preponderance of the evidence shows that the "checks" were lost by appellee, and that the judgment of the trial court in favor of appellee is manifestly against the weight of the evidence.

Appellee admits that he signed a receipt for all the "checks" issued to him by the cashier on the day appellant claims the "checks" were lost. He admits that he did not count the "checks" when he received them, nor when he turned them in. He also admits that he did not ask for a receipt when he turned in the checks and went "off duty." But he testified that he turned back all of the checks that he did not use. He testified further that nothing was said to him about any checks being lost when he turned in the checks, but admits that the next day he was told that he "was short six checks" by one of the checkers. He testified that at the time the checker told him this, he said to the checker: "I am positive could not lose no six checks, because those checks are on a book about that thick, got rubber band around, got clips that holds them in." Appellee testified that "those checks to the best of my knowledge was missed from the middle, must have pulled out on purpose, never be in at all." Appellee was asked this question: "Can you say whether or not definitely, whether you turned those checks back to the Harrison Hotel Company that evening?" He replied: "Not that time, I turned back all the checks what I not use."

On behalf of appellant, one of its employees testified that he notified the appellee of the loss of the "checks" the day after they were lost and told him how careless he was to

[illegible] of the idea of his worry questions signify the agreement to "obtain by all of that" rules, including this 3.

The principal thing of fact involved in the case is whether appellee lost the six "checks" in question. He claims that he lost them.

Appellant contends that a preponderance of the evidence shows that the "checks" were lost by appellee, and that the judgment of the trial court in favor of appellee is manifestly against the weight of the evidence.

Appellee testified that he placed a receipt for all the "checks" issued to him by the auditor on the day appellant claims the "checks" were lost. He stated that he did not count the "checks" when he received them, nor when he turned them in. He also admitted that he did not ask for a receipt when he turned in the checks. He said "NOT [illegible]" that he testified that he turned back all of the checks that he did not use. He testified further that nothing was said to him about any checks being lost when he turned in the checks, but admits that the next day he was told that he "was short six checks" by one of the checkers. He testified that at the time the checker told him this, he said to the checker: "I am positive would not have an six checks, because those checks are in a book about this thick, and I never had opened, yet while that book was, I [illegible] that "those checks, to the best of my knowledge was missed from the middle, must have pulled out on purpose, never be in at all." Appellee was asked this question: "Can you say whether or not definitely, whether you turned those checks back to the Berkshire Hotel Company that evening?" He replied: "At that time, I turned back all the checks what I not use."

On behalf of appellant, one of his employees testified that he notified the appellee of the loss of the "checks" the day after they were lost and told him how careless he was in

leave his book around on the tables.

Appellant introduced in evidence record sheets showing that appellee signed a receipt for the checks claimed to have been lost. The auditor of appellant was asked this question: "Are these all the checks that were turned in as used by waiter Number 3 on May 10th (exhibiting documents to witness)?" He answered: "That is all there are."

The auditor further testified that he examined his files for the alleged missing checks, and did not find them. Appellee continued to work from the day he was notified of the loss of the "checks," namely the 12th of May, until the next pay day, the 20th of May. On the latter date appellee voluntarily left the employ of appellant.

On the evidence there is a doubt as to whether appellee lost the checks, but a finding of a court will not be disturbed merely because a case is doubtful. Illinois Central Railroad Company v. Cowles, 32 Ill. 116, 121.

We are of the opinion that the judgment of the trial court is not manifestly against the weight of the evidence.

In the view we have taken of the case it is unnecessary to consider the question whether Rule 2 charging $5 against a waiter for "Losing a check" provides for a penalty or for liquidated damages.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

have his name printed on the ballots.

Appellant introduces in evidence exact sheets showing that appellant signed a receipt for the ballots claimed to have been lost. The receipt of appellant was dated this question: "Are these all the ballots that were returned to us used by voter number 1 on Nov 2010 Legislative Referendum in Wyoming?" to answer: "Yes, is all there are."

The Secretary further testified that he received his ballot for the alleged missing ballots, and did not find them. Appellee undertook to work from the day he was notified of the loss of the "ballots," namely the 12th of Nov, until the next day, the 13th of Nov. In the letter Aug 1010 Legislative referendum left the number of ballots.

On the evidence there is a doubt as to whether ballots lost the ballots, but a finding of a voter will not be disturbed merely because a fact is doubtful. Illinois Central Railroad Company v. Indian, 31 Ill. 111, 114.

In view of the evidence that the jurisdiction of the trial court is not manifestly against the weight of the evidence.

In the view we have taken of the case it is unnecessary to consider the question whether this I dismissing the against a motion for "Leaving a charge" provides for a penalty or for liquidated damages.

Affirmed.

Barnett, P. J., and McGoodwin, J., concur.

343 - 28178

PETER MALEK, Appellant, vs. JOSEPH SMUDZINSKI et al., Appellees.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

In this case a bill in equity was filed by Malek, appellant, to establish and foreclose an alleged equitable lien on the property of the Smudzinskis, husband and wife, appellees, for $1,000. The substance of the bill, briefly stated, is that appellees applied to appellant for a loan of $1,000 with which to pay off a mortgage on their property, which was about to be foreclosed by a proceeding then pending in court; that appellant advanced and paid them the money for that purpose; that they executed a note for $1,000, and also executed and recorded a trust deed to secure the note; that they never filed the trust deed; that instead of using the money to pay off the mortgage they appropriated the money to their own use, and permitted their property to be foreclosed and sold. Appellees filed an answer to the bill denying, in substance, that they ever made application for the loan; or that appellant advanced any money to them; or that they received any money from appellant; or that they executed a note and trust deed to secure the note. A replication was filed. The case was heard upon the bill, answer, replication and the evidence taken in open court. The court dismissed the bill for want of equity.

The evidence is not clear and convincing. Smudzinski, appellee, spoke English imperfectly and part of his testimony was given through an interpreter. The undisputed facts are

[illegible] PAGE,
Appellant,

vs.

[illegible] BOOKCHINSKI et al.,
Appellees.

APPEAL FROM
CHAMBERS COURT,
COOK COUNTY.

MR. JUSTICE [illegible] delivered the opinion of the court.

In this case a bill in equity was taken by minor, appellant, to establish and foreclose an alleged equitable lien on the property of the defendants, husband and wife, appellees, for $3,000. The substance of the bill, briefly stated, is that appellees applied to appellant for a loan of $3,000 with which to pay off a mortgage on their property, which was about to be foreclosed by a proceeding then pending in court; that appellant advanced and paid them the money for that purpose; that they executed a note for $3,000, and also executed and recorded a trust deed to secure the same; that they never filed the trust deed; that instead of using the money to pay off the mortgage they appropriated the money to their own use, and converted their property to be foreclosed and sold. Appellees filed an answer to the bill denying, in substance, that they ever made application for the loan; or that appellant advanced any money to them; or that they received any money from appellant; or that they executed a note and trust deed to secure the same. A replication was filed. The case was heard upon the bill, answer, replication and the evidence taken in open court. The court dismissed the bill for want of equity.

The evidence is not clear and convincing. Mostowski, appellee, spoke English imperfectly and part of his testimony was given through an interpreter. The mortgagee from who

as follows: Appellees had mortgaged their property to one Jareczek for $800, and the mortgage was about to be foreclosed. In order to pay off the mortgage, application was made by appellees to appellant for a loan of $1,000. Mendrewski, a real estate broker who lived in the neighborhood, assisted appellees in obtaining the loan from appellant. It was explained to appellant that $800 of the $1,000 that he was to lend appellees was to be used for the purpose of paying off the Jareczek mortgage. A note for $1,000 and a trust deed to secure the note were to be executed by appellees. The application for the loan from appellant was made on April 24, 1920. The money was given to Mendrewski by Malek on April 26, 1920. The note for the $1,000 was signed by appellees, but no trust deed was ever executed by them. Six interest coupons were signed in the name of appellees, but it is admitted that the signatures were forged by Mendrewski. The Jareczek mortgage of $800 was not paid, and the property was foreclosed. The appellees never received the $1,000 nor any part of it. Mendrewski embezzled the money. He absconded about March or April, 1921.

The principal issue in the case is one of fact and is involved in the question whether appellees authorized appellant to pay the money to Mendrewski. On this issue the evidence is conflicting and unsatisfactory. The only witnesses who testified directly on the issue are appellant and appellee Joseph Smudzinski and they flatly contradict each other. The testimony which bears on the issue is as follows:

Appellant testified, in substance, that on April 24, 1920, appellee Joseph Smudzinski and Mendrewski came to his house and applied for a loan of $1,000; that they told him that appellee, Joseph Smudzinski, "had to pay on May 5th;" that the three of them went to Mendrewski's office to "make out the papers;" that at this time appellee Joseph Smudzinski said, "any time before the 5th I want to have that money laid right

as follows: appellees had mortgaged their property to one Lowenkam for $800, and the mortgage was about to be foreclosed. In order to pay off the mortgage, application was made by appellees to appellant for a loan of $1,000. Mondenkopf, a real estate broker who lived in the neighborhood, assisted appellees in obtaining the loan from appellant. It was explained to appellant that $800 of the $1,000 that he was to lend appellees was to be used for the purpose of paying off the Lowenkam mortgage. A note for $1,000 and a trust deed to secure the note were to be executed by appellees. The application for the loan from appellant was made on April 19, 1926. The money was lent on Monday by wire on April 20, 1926. The note for the $1,000 was signed by appellees, but no trust deed was ever executed by them. All instruments were signed in the name of appellees, but it is admitted that the signatures were forged by Mondenkopf. The fraudulent mortgage of 1926 was not paid, and the property was foreclosed. The appellees never received the $1,000 nor any part of it. Mondenkopf embezzled the money. He absconded about April 21, 1926.

The principal issue in the case is one of fact and is involved in the question whether appellees authorized Mondenkopf to pay the money to Bondurant. On this issue the evidence is conflicting and unusual indeed. The only witnesses who testified directly on the issue are appellant and appellee Joseph Mondenkopf and they flatly contradict each other. The testimony which bears on the issue is as follows:

Appellant testified, in substance, that on April 19, 1926, appellee Joseph Mondenkopf and Mondenkopf came to his house and applied for a loan of $1,000; that they told him that appellee, Joseph Mondenkopf, had to pay on May 1st; that the three of them went to Bondurant's office to take out the papers; that at that time appellee Joseph Mondenkopf said, "any time before the 1st I want to have that money land right

in this office; that appellant said, "all right I will do that;" that later, on April 26, 1920, appellant took the money to Mendrewski and said, "This is that money that thousand dollars;" that Mendrewski gave him the note for $1,000 but did not give him the trust deed; that Mendrewski said the trust deed "would have to go to the Recorder;" that when the Jareczek mortgage was foreclosed, appellant went to see appellee Joseph Smudzinski and told him of the foreclosure, and also told him that he, Smudzinski, would have to pay the $800; that appellee Joseph Smudzinski told him that the mortgage was not foreclosed, and that he, Smudzinski, said he "was by Mendrewski," and "he told me that wasn't so." Appellant further testified that on October 23, 1920, about the time the interest of $30 on one coupon was due, he went to see appellee Joseph Smudzinski about it and Smudzinski told him to go to Mendrewski for the interest; that he went to Mendrewski, told him Smudzinski had sent him, and Mendrewski paid the interest. Appellant further testified that after Mendrewski absconded, he got Gorski, a lawyer, to see appellee Joseph Smudzinski about giving a mortgage to appellant for $2500 to cover the loss and "leave a little to spare."

Gorski testified that appellee Joseph Smudzinski agreed to give the mortgage, but that after Smudzinski saw Wengerski, Smudzinski's lawyer, Wengerski said he could not agree to it.

Schimikeski, father-in-law of appellant, testified that appellee Joseph Smudzinski said to him one day when they met, "it is soon going to be due to pay your son-in-law interest;" that at this meeting Schimikeski asked his daughter when the interest would be due; that she said Smudzinski had to pay interest October 26, and that he told Smudzinski when it would be due; that Smudzinski said, "all right, tell him to go to Mendrewski two or three days ahead of the time and get the money, let him pay the interest and come to me and I will pay it."

Appellee Joseph Smudzinski testified that he never

in this office; that appellant said, "All right I will do that;" that later, on April 26, 1930, appellant took the money to Bren-dewerk and said, "This is that money that thousand dollars;" that Beaudewerk gave him the note for $1,000 but did not give him the crack deed; that Beaudewerk said the crack deed "would have to go to the director;" that when the Interest mortgage was released, appellant went to see appellee Joseph Baudinkmek and told him of the foreclosure, and also told him that he, Baudinkmek, would have to pay the $800; that appellee Joseph Baudinkmek told him that the mortgage was not foreclosed, and that he, Baudinkmek, said he "was by Beaudewerk," and "he told me that wasn't so." Appellant further testified that on October 26, 1930, about the time the interest of $30 on one coupon was due, he went to see appellee Joseph Baudinkmek about it and Baudinkmek told him to go to Beaudewerk for the interest; that he went to Beaudewerk, told him Baudinkmek had sent him, and Bren-dewerk paid the interest. Appellant further testified that after Bren-dewerk absconded, he got Gorski, a lawyer, to see appellee Joseph Baudinkmek about giving a mortgage to appellant for $2800 to cover the loan and "leave a little to spare."

Gorski testified that appellee Joseph Baudinkmek agreed to give the mortgage, but that after Baudinkmek saw Beaudewerk, Baudinkmek's lawyer, "Gorski said he could not agree to it.

Baudinkmek, father-in-law of appellant, testified that appellee Joseph Baudinkmek said to him one day when they met, "it is soon going to be due to pay your son-in-law interest;" that at this meeting Baudinkmek asked his daughter when the interest would be due; that she said Baudinkmek had to pay interest October 26, and that he told Baudinkmek when it would be due; that Baud-inkmek said, "all right, tell him to go to Beaudewerk two or three days ahead of the time and get the money, let him pay the interest and come to me and I will pay it."

Appellee Joseph Baudinkmek

testified that he never

went to appellant's house for the loan; that he went to Mendrewski's office and told him he wanted "some money to pay Mrs. Jareczek," and Mendrewski said, "All right, I will fix it for you;" that the first and only time he saw appellant was when appellant came to see him after "Mendrewski ran away;" that he, Smudzinski, never told Mendrewski to accept the $1,000 for him from appellant; that he "never told him he was going to get it - loan some money for me;" that he did not "tell him who to go to to get it;" that he never had any real estate deals with Mendrewski; that he had "insurance down there and water taxes and city taxes - paid money to him;" that Mendrewski negotiated the Jareczek mortgage "free of charge;" that after Mendrewski went away Schimikeski came to him, Smudzinski, and said he wanted $30 interest; that he did not tell Schimikeski that he, Smudzinski, would pay the interest to appellant; that Schimikeski came back and told him that he got the $30; that he never told Schimikeski to go to Mendrewski and he would pay it; that when appellant came to his, Smudzinski's, house three or four days after Mendrewski ran away, appellant showed a note to his, Smudzinski's, wife and "wanted to settle with him;" that at this time appellant said, "I loaned money to you;" that he, Smudzinski, said, "I don't know anything about it - I never see the money;" that this was the first time he ever saw appellant; that Gorski and appellant came to see him in 1921 and "wanted to know what we were going to do about the thousand that was loaned from Mendrewski;" and that he said, "I didn't see any money;" that they asked him "to go to Gorski's office and sign for $2500;" that he said he couldn't - would have to ask Wengerski;" that Jareczek came to his house and "said I should pay his Mother off;" that "I said all right, I will look after it, I will go to Mendrewski;" that in regard to the loan from appellant, Mendrewski said, "All right, he would get it;" that he, Smudzinski, told him when the note

work to appellant's house for the loan; then he went to dis-
charge's office and told him he would "make money in any
Sir. Lorenzo," and Bandrowski said, "All right, I will
file it for you;" that the first and only time he saw
appellant was when appellant came to see him after "Bandrowski
was away;" that he, Bandrowski, never told Bandrowski to secure
the $2,000 for him from appellant; that he "never said him he
was going to get it - loan some money for us;" that he did not
"ask him who to go to to get it;" that he never had any part
which their with Bandrowski; that he had "Bandrowski have first
and water taxes and city taxes - paid money to him;" that Ban-
drowski supplied the foreman carpenter "two or three;" that
after Bandrowski had many conversations to him, Bandrowski,
and said he wanted $20 interest; that he did not tell Bandrowski,
that he, Bandrowski, would pay the interest to appellant; that
Bandrowski came back and told him that he got the $20; that he never
told Bandrowski to go to Bandrowski and he paid; that
when appellant came to him, Bandrowski's, house there or four
days after Bandrowski had gone, appellant turned a note to him,
Bandrowski's, wife and "wanted to build with him;" that he like
the appellant said, "I loaned money to you;" that he, Bandrowski,
said, "I don't know anything about it - I never see the money;" that
this was the first time he ever saw appellant; that Gerald and
appellant came to see him in 1923 and "wanted to know what we were
going to do about the diamond that was lighted from Bandrowski;"
and that he said, "I didn't see any money;" that they asked him
"to go to Gerald's office and sign for $2000;" then he said he
wouldn't - would have to ask "Bandrowski;" that Bandrowski came to
his house and "said I should pay his brother off;" that "I told him
right, I will look after it, I will go to Bandrowski;" that he
talked to the loan from appellant, Bandrowski said, "All right,
he would get it;" that he, Bandrowski, told him were the note

was due and never went back.

Appellee Rosalia Smudzinski, wife of Joseph Smudzinski, testified that she signed "some paper" at Mendrewski's office; that the first time she ever saw appellant was when he came to her home in April, 1920, about the interest notes; that appellant asked her if she paid the interest; that she said, "Why shall I pay interest because I didn't borrow any money;" that appellant showed her the coupons and asked her if she had one of these; that she said, "I haven't got any because I didn't make any loans;" that appellant showed her a coupon and asked her if that was her signature; that she said, "It is not my writing and not my husband's writing;" that appellant said, "This writing is Mendrewski's; that when appellant and Gorski came to "talk settlement," there was only "something said that we were to go to Gorski and make a settlement."

On the evidence, a doubt arises as to whether appellant was authorized by appellee to pay the money to Mendrewski. When appellee Joseph Smudzinski is alleged to have given appellant the authority three persons were present - appellee Joseph Smudzinski, Mendrewski and appellant. Mendrewski is away and did not testify. That leaves the issue between appellant and appellee Joseph Smudzinski. The testimony of Schimikoski and Gorski tends to corroborate appellant to the extent that appellee Joseph Smudzinski knew that Mendrewski had the money. But Smudzinski contradicts Schimikoski that Gorski, and appellee Rosalia Smudzinski's version of Gorski's effort to effect a settlement after Mendrewski went away, differs from Gorski's. The evidence shows that appellee Joseph Smudzinski relied entirely on Mendrewski. He testified that he never saw appellant at the time the loan was applied for; that he went to Mendrewski's office "about the $1,000 loan, maybe March or February - before the other was due - 1920;" that he told Mendrewski that he wanted "some money," also told him when the Jarecsek mortgage was due, and that Mendrewski said, "All right, he would get it;" and that he, Smudzinski, "didn't go back."

was due and never went back.

Aurelio Ronalds Mendiburu, who at Cerro Muerto, justified that the signed "some money" at Bonaventura's action; that we first take the over our expenditure we then be sure to for some in cash, also, that the interest money that Mendiburu had if the full the interest, that the note, "Why shall I pay interest - since I give's before my money;" then Mendiburu chose the 50 ounces and asked for it; he had one of them; then he said, "I haven't got any because I didn't make my income;" that Mendiburu showed our a souper and asked for it that's a lot; finally, he said, "It is not my writing and my handbook's with me;" this Mendiburu said, "This writing is Bonaventura's; then Mendiburu and Gerrok came to "talk settlement," there was only "something" that we were to go to court and make a settlement."

On the evidence, a doubt arises as to whether Mendiburu was authorized by Aguilar to pay the money to Bonaventura. The Aguilar family maintained it always to have given authority to Mendiburu; there seems also strong - circumstantial, Bonaventura is young and did not lastly, that leaves the issue between Mendiburu and Aguilar dangerously clear. The testimony of Mendiburu and Gerrok tends to corroborate Aguilar to the extent that Aguilar thought Mendiburu was the disbursing his money. But Mendiburu contradicts Gerrok that Gerrok, and similar Mendiburu's version of Gerrok's effort to effect a settlement after Bonaventura was away, differs from Gerrok's. The evidence does not question Gerrok's testimony as Bonaventura. In addition there is no proof as to the time the loan was repaid for; but is used to Bonaventura's office "about the 14,000 loan, maybe about an February - before the other was due - 1888;" that he told Gerrok that he wanted "some money," also told him when the Jackson mortgage was due, and that Bonaventura said, "All right, he would get it;" and that he, Bonaventura, "didn't go back."

Apparently Smudzinski left the entire matter in the hands of Mendrewski. It is difficult to understand why he made no inquiry of Mendrewski as to whether the money had been obtained, and as to when the trust deed was to be signed. The transaction was not completed when he went to Mendrewski's office. Only the note for $1,000 was signed. The trust deed to secure the note was not executed. The only inference consistent with the testimony of the appellees, the Smudzinskis, is that they were waiting for notice from Mendrewski. It may be that appellee Joseph Smudzinski intended that Mendrewski should receive the money from appellant, but he denies positively that he ever told appellant to pay the money to Mendrewski. Without authority from appellees to receive the money Mendrewski had no implied power to accept the money from appellant in behalf of appellees, the Smudzinskis. A broker is usually given only such authority as is commensurate with the duty of negotiating a deal, and he is deemed to have no implied power to receive payment in behalf of his employer. A debtor of the latter making payment to him does so at the risk of having to pay again in case the broker defaults. 4 Ruling Case Law, Section 11, p. 559; 4 Am. & Eng. Enc. of Law, p. 965. Proof of authority to make the loan is not evidence of authority to collect either principal or interest. Ortmeier v. Ivory, 208 Ill. 577.

Assuming that appellant's testimony is correct that appellees authorized him to pay the money to Mendrewski, yet appellant made no effort to ascertain if appellees or Mendrewski had applied the money to the use for which it was lent. Furthermore, appellant, on his own testimony, paid the money while the transaction was incomplete. The trust deed had not been executed when appellant paid the money. Appellant relied on Mendrewski's statement that the trust deed could not be delivered to him until it had been recorded. The evidence shows that appellant never told appellees that he had paid the money to Mendrewski until about July 11, 1920,

Apparently confident that the writing matter in the hands of Bonaventure. It is difficult to understand why he made no inquiry of Bonaventure as to whether the money had been obtained, and so in when the trust deed was to be signed. The transaction was not completed when he went to Bonaventure's office. Only the sum of $1,000 was signed. The trust deed to secure the rest was not executed. The only information conveyed with the handing of the application, the condition, is that they were waiting for money from Bonaventure. It may be that appellee's counsel contends that Bonaventure should receive the money from appellant, or he takes position that he was held originally to pay the money to appellee Gawenil. Either method from appellee to receive the money from Gawenil had no implied power to accept the money from appellant in behalf of appellee, the condition. A broker is usually given only such authority as is consistent with the duty of negotiating a deal, and he is deemed to have no implied power to receive payment in behalf of his employer. A broker or the latter making payment to the broker is at the risk of proving it was the broker defaulter. Walker Bank Bros, Section 11, p. 187; 4 Am. & Eng. Ca. of Law, p. 905. Proof of authority to make the loan is not evidence of authority to receive payment of indebtedness. Cheshire v. Ivey, 240 Ill. 377.

Assuming that appellant's testimony is correct that appellee authorized him to pay the money to Bonaventure, yet appellant made no effort to ascertain if appellee or Bonaventure had applied the money to the use for which it was lent. Bonaventure, evidently, on his own testimony, put the money while the transaction was incomplete. The trust deed had not been executed when appellant paid the money. Appellant relied on Bonaventure's statement that the trust deed would not be delivered to him until it had been recorded. The evidence shows that appellant never held assurance that he had paid the money to Bonaventure until about July 12, 1920,

when the Jarecsek mortgage was foreclosed. This was several months after the time - April 26, 1920 - when appellant says he paid the money to Hendrewski. The latter had not absconded at that time. He did not go away until about April, 1921. During the year that intervened between the time appellant says he paid the money to Hendrewski and the latter's flight, appellant did nothing whatever to protect himself. Appellant, as he himself says in his testimony, "waited too long." The evidence shows that the transaction in question was appellant's first experience in a matter of this kind.

After a careful consideration of the evidence, we do not feel justified in disturbing the decree of the lower court. The evidence, as we have stated, is conflicting and, in parts, confused. The lower court had the advantage, which is a matter of material and decided value, of seeing the witnesses and of observing their demeanor and manner of testifying. For that reason the lower court was in a better position than this court to determine the credibility of the witnesses and the weight of their testimony. "Where the witnesses are produced and examined in open court, the finding of the court will not be disturbed unless the finding is manifestly and clearly against the evidence." Miltimore v. Perry, 171 Ill. 218, 228.

For the reasons stated, the decree is affirmed.

AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

when the Tuscanna mortgage was foreclosed. This was reversed months after the time - April 16, 1920 - when creditors were to pick the money in Washington. The Larson had not abandoned at that time. He did not go away until about April, 1921. Having the year that interposed between the time creditors came to pick the money in Washington and the Larsons' flight, creditors did nothing whatever to protect themself. Creditors, as be himself says in his testimony, "waited too long". The evidence shows that the transaction in question was apparently first experienced in a matter of this kind. There a careful consideration of the evidence, we do not find justification in disregarding the issues of the lower court. The evidence, as we have stated, is conflicting and, in part, improbable. The lower court had the advantage, which is a matter of material and decisive value, of seeing the witnesses and of observing their manner and manner of testifying. For that reason the lower court was in a better position than this court to determine the credibility of the witnesses and the weight of their testimony. Since the claimants are producing and relying in open court, the finding of the court will not be disturbed unless the finding is manifestly and clearly against the evidence." Bilbrey v. Burns, 171 Ill. App. 164.

For the reasons stated, the decree is affirmed.

AFFIRMED.

Moorely, P. J., and Matchett, J., concur.

364 - 38199

CHARLES H. BRAMWELL, Appellee,	APPEAL FROM
vs.	MUNICIPAL COURT
W. A. HITCHCOCK, Appellant.	OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal in an action of forcible detainer from a judgment of the Municipal Court entered in favor of appellee for the recovery of possession of the premises owned by appellee. Appellant was a tenant occupying an apartment owned by appellee, under a lease which began May 1, 1921, and expired April 30, 1922.

The only question in the case is whether a verbal agreement was entered into between the parties for the renewal of the lease. Appellant and his wife were the only witnesses. Negotiations for the renewal of the lease expended over several weeks. According to the evidence, on April 3rd appellant called at the office of the agent of the premises and had a conversation in regard to the renewal of the lease. The agent proposed that appellant sign a lease "for three years or nothing." Later, in a conversation with the agent in appellant's home, appellant told the agent he "would sign a lease for a year at $100 per month." At another time appellant told the agent that if he "would put a clause in the lease agreeing to sub-lease the apartment at any time" appellant saw fit and "would do the sub-leasing at the rate of $100 per month," appellant would sign a "three (3) year lease." On April 6th, appellant wrote the agent stating the same terms, and the agent agreed to send appellant such a lease. On April 11th the agent sent appellant a lease, which

appellant returned "because it was not in conformity to his agreement." On April 26th appellant wrote to the agent. On April 27th the agent called appellant on the telephone and told him "that it ought to be settled at once, or it would not be settled at all." Appellant called at the office of the agent on April 27th, and the agent told him "he would not enter into a lease of any kind." Appellant's wife testified that the agent offered a lease for three years but that she told him, "We could not sign a three (3) year lease." On May 1, appellant tendered the agent a certified check for the rent of May, which was refused.

On the facts in the case it is evident that there was no verbal agreement entered into for a renewal of the lease. The negotiations for a lease failed. The appellant, therefore, under the law was not justified in holding over so as to relieve him from his covenant to yield up to the lessor the possession of the premises at the end of the term. Peppers v. Meagher, 148 Ill. 192.

Counsel for appellant contend that the present case is governed by the act of April 29, 1921 (Illinois Session Laws 1921, pp. 504-5), which requires sixty days notice in writing to be given in cases of tenancy by the month or for any other term less than one year where the tenant holds over without special agreement. In the present case the tenancy was not by the month or less than a year but was for a year beginning May 1, 1921, and expiring April 30, 1922.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

appellant returned "because it was not in conformity to the agreement." On April 8th appellant wrote to the agent. On April 27th the agent called appellant on the telephone and told him "that it ought to be settled at once, or it would not be worth it all." Appellant called in the afternoon of the agent on April 27th, and the agent told him "he would not sign a lease of any kind." Appellant's wife testified that the agent offered a lease for three years but that she told him, "We could not sign a three (3) year lease." On May 1, appellant tendered the agent a certified check for the rent of May, which was refused.

On the facts in the case it is evident that there was no a/bsolute agreement entered into for a renewal of the lease. The negotiations for a lease failed. The appellant, therefore, under the law was not justified in holding over so as to have him f=ree his covenant to yield up to the lessor the possession of the premises at the end of the term. Kennedy v. Ranger, 240 Ill. 198.

Demand for appellant evident that the property was in possession on the end of April 30, 1922 (Illinois Revised Laws 1921, p. 5-6), which requires sixty days notice in writing to be given in case of tenancy by the month or for any other term less than one year where the tenant holds over without special agreement. In the present case the tenancy was not by the month or less than a year but was for a year beginning May 1, 1922, and expiring April 30, 1923.

Judgment affirmed.

McSurely, P. J., and Kadhatt, J., concur.

58 - 27890

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ANTON WALMONT, etc., Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The writ of error is brought to review a record wherein it appears that an information was filed on June 20, 1922, charging that plaintiff in error did, on June 19, 1922, in the city of Chicago, in the State of Illinois, with a revolver, the same being a dangerous and deadly weapon, without any considerable provocation, make an assault upon one Paul M. Williams, with intent to inflict upon him a bodily injury.

The record shows a jury waiver filed on the same day and the judgment recites that defendant was arrested without a warrant or other writ; that he being present in open court, the bailiff was ordered to take him into custody. "Trial is entered upon by the court without a jury, and hears witnesses and testimony of counsel." Thereupon the court found the defendant guilty in manner and form as charged in the information, and sentenced him to confinement in the House of Correction for a term of one year. Judgment was also entered against him for costs. The cause is now before us on rehearing granted with permission to file a new abstract correcting defects because of which the judgment was affirmed.

On July 19th a motion of defendant to vacate the finding and judgment, and for leave to file an affidavit in support of the motion was overruled. The affidavit has been

Defendant in error.

Error to the Municipal Court of Chicago.

Mr. Justice Jonkinson delivered the opinion of the court.

The writ of error in question is seeking a reversal whereby it appears that an information was filed on June 20, 1927, charging that plaintiff in error did, on June 19, 1927, in the city of Chicago, in the State of Illinois, with a revolver, the same being a dangerous and deadly weapon, without any effective provocation, make an assault upon one Paul G. Williams, with intent to inflict upon him a fatal injury.

The report shows a jury waiver filed on the same day and the judgment recites that defendant was arraigned without a warrant or other writ; that he being present in open court, the bailiff was ordered to take him into custody. "Trial is entered upon by the court without a jury, and hears witnesses and testimony of counsel." Thereupon the court found the defendant guilty in manner and form as charged in the information, and sentenced him to confinement in the House of Correction for a term of one year. Judgment was also entered against him for costs. The cause is now before us on rehearing granted with permission to file a new abstract correcting defects because of which the judgment was affirmed.

On July 19th a motion of defendant to vacate the finding and judgment, and for leave to file an affidavit in support of the motion was overruled. The affidavit has been

preserved by a bill of exceptions and the facts therein alleged are not denied. These are to the effect that the defendant was placed under arrest on the afternoon of June 19, 1922, at about the hour of 5 p. m.; that prior to that time he had been drinking intoxicating liquors and was strongly under the influence of the same; that on the night of June 19th, 1922, he did not get any sleep or rest, and that when he was arrested he was in a condition of stupor and unable to understand the meaning and purport of the proceedings then in progress; that he signed a waiver of trial by jury because he was told to do so by some person unknown to him, but who appeared to be in authority; that he did not read the jury waiver and did not understand the contents or purpose of the same. "This affiant further says that from the moment of his arrest and prior to his arraignment at trial, he was unable to and did not understand his situation or the nature of the proceedings against him, and in consequence thereof, did not communicate with any person who could or would have advised him as to same, or act for or in his behalf; and this affiant was not informed as to his right to be represented by counsel, or of his right to have a continuance to secure counsel, and hence did not have an attorney present at the trial, and was unable to present any evidence or defense."

We think upon the showing made (and it is uncontradicted on the record) that the court erred in its refusal to grant a new trial, and for that purpose the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

preserved by a bill of exceptions and the facts therein alleged are not denied. There are in the record that the defendant was placed under arrest on the afternoon of June 20, 1898, at about the hour of 5 p. m.; that prior to that time he had been exhibiting indecentlng figures and was strongly under the influence of the same; that on the night of June 20th, 1898, he did not get any sleep or rest, and that when he was arrested he was in a condition of stupor and unable to understand the meaning and purport of the proceedings then in progress; that he signed a waiver of rights by fear because he was told so to do by some person unknown to him, who appeared to be in authority; that he did not read the fear waiver nor did he understand the contents or purpose of the same. "This affidavit further says that from the moment of his arrest and prior to his arraignment at trial, he was unable to and did not understand his situation or the nature of the proceedings against him, and in consequence thereof, did not communicate with any person who could or would have advised him as to same, or act for or in his behalf; and this affiant was not informed as to his right to be represented by counsel, or of his right to have a continuance to secure counsel, and hence did not have an attorney present at the trial, and was unable to present any evidence or defense."

We think upon the showing made (and it is uncontradicted on the record) that the court erred in the refusal to grant a new trial, and for that purpose the judgment is reversed and the cause remanded.

Reversed.

Mahoney, J. T., and Jiménez, J., concur.

110 - 27942

CORNELIUS LUMBER COMPANY,
a Corporation,
Appellee,

vs.

FRANK I. ANSOTT,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $1242.21 entered upon the finding of the court.

The suit was brought for the purchase price of a carload of lumber, together with freight charges thereon, and the only defense offered at the trial was that the plaintiff was precluded from maintaining its suit because at the time of the transaction it was a foreign corporation, not licensed to do business in the State of Illinois, but that it was nevertheless doing business in the state contrary to the provisions of the statutes. The defendant at the conclusion of the evidence submitted to the court propositions of law, but the court refused to hold as requested by defendant, that under the law and the evidence the plaintiff was not entitled to recover. The theory of the trial court apparently was that the transaction in question was one in interstate commerce and that the statute of the state was therefore not applicable to it, and this is, we think, the controlling question in the case.

The defendant says that the question of interstate commerce is not an issue on the pleadings; that it is not mentioned in the affidavit of merits; and that plaintiff did not make it an issue by any reply. We think defendant misunderstands the situation. The defense was an affirmative one, in substance, a plea in bar to the action. This court has held in a case where

a similar defense was made that the pleading of the defendant must negative the fact that the transaction was one in interstate commerce, and that if the pleading fails to do this it is insufficient. Bamberger-Diern Co. v. Anderson et al., 267 Ill. App. 222. In that case the court said:

> "The record discloses that the motion to strike was allowed mainly, if not wholly, on the ground that the affidavit did not allege that the transaction sued on was not one of interstate commerce. In support of this position appellee urges, and we think correctly, that even though a foreign corporation may be doing business in this State without complying with said act, it can maintain a suit based entirely on an interstate commerce transaction, and that, as under a familiar rule of pleading, the affidavit must be construed most strongly against the pleader, it will be presumed that the transaction sued on was one of that character in the absence of an averment in the affidavit to the contrary. From the force of this contention, appellants seek shelter under the liberal form of pleadings employed in the Municipal Court. But as they saw fit not to amend their affidavit after the point was raised, and elected to abide by the same after an adverse ruling thereon, they must be held to have accepted the legal issue thus raised."

But irrespective of any question about the pleadings, we think the facts establish that under rules laid down by the Supreme Court of the United States, the transaction out of which this controversy arose must be held to have been one in interstate commerce.

The plaintiff is a corporation organized under the laws of the State of Missouri, and is in the lumber business. It opened an office in Chicago, Illinois, in January, 1920, with one J. Albert Johnson, since deceased, who was a stockholder, director and vice-president of the plaintiff corporation, as manager. It did not obtain a certificate to do business in this State until July 8, 1920. The transaction in question took place on the 15th or 16th day of April, 1920. Defendant testifies:

> "As I remember, Mr. Johnson called me on the 'phone and told me he had a car containing a certain kind of lumber in Chicago and quoted me a price on it, and I told him I would take it, and he could deliver it over in our yard. It was sold on the usual terms, we were to pay the freight and deduct it from the invoice when it was paid. That is usual and

a similar defense was made that the pleading of the defendant must negative the fact that the transaction was one in interstate commerce, and that if the pleading fails to do this it is insufficient. [illegible] Co. v. [illegible] et al., [illegible] Ill. App. [illegible]. In that case the court said:

> "The record discloses that the action in which was obtained mainly, if not wholly, on the ground that the affidavit did not allege that the transaction sued on was not one of interstate commerce. In support of this position appellee argues, and we think correctly, that even though a foreign corporation may be doing business in this State without complying with said act, it can maintain a suit based entirely on an interstate commerce transaction, and that, as under a familiar rule of pleading, the affidavit must be construed most strongly against the pleader, it will be presumed that the transaction sued on was one of that character in the absence of an averment in the affidavit to the contrary. From the terms of this contention, appellants seem doubtful about the correct form of pleadings employed in the Municipal Court. But as they did not ask to amend their affidavits after the point was raised, and elected to abide by the same after an adverse ruling thereon, they must be held to have accepted the legal issue thus raised."

But irrespective of any question about the pleadings, we think the facts establish that under rules laid down by the Supreme Court of the United States, the transaction out of which this controversy arose must be held to have been one in interstate commerce.

The plaintiff is a corporation organized under the laws of the State of Missouri, and is in the lumber business. It opened an office in Chicago, Illinois, in January, 1927, with one J. Albert Johnson, since deceased, who was a stockholder, director and vice-president of the plaintiff corporation, as manager. It did not obtain a certificate to do business in this State until July 8, 1929. The transaction in question took place on the 15th or 16th day of April, 1929. Defendant testified:

> "As I remember, Mr. Johnson called on me at the house and told me he had a car containing a certain kind of lumber in Chicago and quoted me a price on it, and I told him I would take it, and he would deliver it over in our yard. It was still on the track here, we were to pay the freight and deduct it from the invoice when it was paid. That is usual and

customary. He stated that it was in Chicago at the time; that he had a car in Chicago. That was on the 15th or 16th of April, 1920. It was to be delivered to our yard. About the 20th I called up Mr. Johnson and told him we had not received the car yet. I think the next day or the day after I received a letter from Mr. Johnson, and a copy of the letter and the freight bill referred to in his letter. The freight bill, as I remember it, was that it was shipped by the Cornelius Lumber Company to the Cornelius Lumber Company."

The bill of lading for the car was produced at defendant's request and offered in evidence. It was dated at Memphis, Tenn., April 8, 1920, and shows that the shipment originated at Drew, Miss.; that it was consigned to Cornelius Lumber Company at Chicago, Ill., routed via the Illinois Central. A copy of the freight bill also offered in evidence by the defendant shows that the car was received in Chicago on April 15th. It also appears that on April 16th the plaintiff company, confirming a prior telephone conversation, ordered the Illinois Central Railroad Company to deliver this car to defendant at his place of business at 22nd and Loomis streets, via C. B. & Q. delivery.

In Dahnke-Walker Milling Company v. Bondurant, 257 U. S. 282, the court, considering a defense under a similar statute of the State of Kentucky, said:

"The commerce clause of the Constitution, Art. 1, Section 8, cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported to another for the purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. Brown v. Maryland, 12 Wheat. 419, 446-447; American Steel & Wire Co. v. Speed, 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."

It is true that the court there was considering a suit by a purchaser, while in the instant case we are considering a suit by the seller; but the same rule, we think, would necessarily be applied in both cases.

The defendant cites a number of cases in which the transactions considered arose either out of suits for personal injuries or questions of taxation, where a different rule has been applied. These cases are, we think, clearly distinguishable and may not be considered as authority under circumstances here appearing.

This defense, sought to be interposed as a defense to the payment of the purchase price of goods which have been received and retained, is not one favored by the courts.

The judgment is affirmed.

AFFIRMED.

McCurely, P. J., and Johnston, J., concur.

147 - 27982

(3200)

PAUL STEINLAUF,
Appellee,

vs.

H. E. MULLINER,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

230 I. 304

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action in forcible detainer. The judgment was entered on the finding of the court.

The evidence tended to show that defendant was in possession of the premises under a written lease from one Jason R. Lewis and that the lease by its terms expired on the first day of May, 1922. Jason R. Lewis, the owner and lessor, by deed executed on January 24, 1921, transferred the premises in question to the plaintiff, Steinlauf. The defendant, having been notified of the transfer, claimed the right to remain in possession of the premises by virtue of his acceptance of a proposition made by said Jason R. Lewis in a letter dated November 7, 1920, in which he said:

> "If you want a longer lease than the time designated in the lease you may have the date extended to two years from next May at $40.00 per month, and keep this letter as your authority for so doing."

After the property had been transferred to plaintiff and the tenants notified, defendant claimed an acceptance by him of this proposition, but the correspondence in evidence evidently indicated to the trial court, as it does to us, that he had not in fact accepted the proposition, but on the contrary had declined to accept it. The trial court therefore rightly so found. The plaintiff and not defendant was entitled to possession of the premises.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., concurs.

[illegible] Appellee,

vs.

[illegible] Appellant.

[illegible] APPEAL FROM [illegible] COURT.

H. [illegible].

[illegible]

[illegible] ACTION OF THE COURT OF [illegible].

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action in forcible detainer. The judgment was entered on the finding of the court.

The evidence tended to show that defendant was in possession of the premises under a written lease from one Jason R. Lewis and that the lease by its terms expired on the first day of May, 1922. Jason R. Lewis, the owner and lessor, by deed executed on January 24, 1923, transferred the premises in question to the plaintiff, Stehlmann. The defendant, having been notified of the transfer, claimed the right to remain in possession of the premises by virtue of his acceptance of a proposition made by said Jason R. Lewis in a letter dated November 7, 1920, in which he said:

> "If you want a longer lease than the time designated in the lease you may have the date extended to two years from said May at $10.00 per month, and keep this letter as your authority for so doing."

After the property had been transferred to plaintiff and the tenants notified, defendant claimed an acceptance by him of this proposition, but the correspondence in evidence evidently indicated to the trial court, as it does to us, that he did not in fact accept the proposition, but on the contrary had declined to accept it. The trial court therefore rightly so found. The plaintiff and not defendant was entitled to possession of the premises.

The judgment is affirmed.

AFFIRMED.

Mahoney, J. J., concurs.

158 - 27993

RALPH A. BRAIN and CHARLES BENSON, Appellees,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
COURTNEY R. GLEASON et al.,	
ON APPEAL OF COURTNEY R. GLEASON and GEORGIA S. GLEASON, Appellants.	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment in the sum of $1300 entered upon the verdict of a jury, motions for a new trial and in arrest of judgment having been overruled.

The amended statement of claim alleged that about August 27, 1915, defendants sold and conveyed to plaintiffs, certain lands, buildings and improvements thereon, the transfer being evidenced by a warranty deed; that by and through said warranty deed and conveyance defendants conveyed and warranted the premises, buildings and improvements thereon to plaintiffs; that defendants failed in said covenant of warranty, and that a breach occurred in said covenant in that a certain building located on a part of the premises known as lots 198 and 199, mentioned in the deed, at the time of the giving of said warranty and said conveyance was not delivered to plaintiffs in accordance with the terms of the conveyance and deed.

The defendants filed an affidavit of merits in which they denied that they had sold or conveyed to plaintiffs the buildings or improvements upon the lots as alleged; denied that they conveyed and warranted the buildings or improvements, or that they had failed in the covenant of warranty, or that a

No. 12[illegible] - [illegible]

[illegible] v. [illegible] and
[illegible],
Plaintiffs,

vs.

[illegible] D. [illegible] et al.,
[illegible] of [illegible] v. [illegible]
and [illegible] v. [illegible],
Defendants.

[illegible]

[illegible] DISTRICT COURT
[illegible] DISTRICT

[illegible]

[illegible]

No. 12[illegible] [illegible] DISTRICT OF [illegible] COURT.

This is an appeal by the defendants from a judgment in the sum of [illegible] entered upon the verdict of a jury, motions for a new trial and in arrest of judgment having been overruled.

The amended statement of claim alleged that about August 27, 1932, defendants sold and conveyed to plaintiffs, certain lands, buildings and improvements thereon, the conveyance being evidenced by a warranty deed; that by and through said warranty deed and conveyance defendants covenanted and warranted the premises, buildings and improvements thereon to be in good; that defendants failed in said covenant of warranty, and that a breach occurred in said covenants in that a certain building located on a part of the premises known as lots 3A and 3B, situated in the town, at the time of the giving of said warranty and said conveyance was not delivered to plaintiffs in conformance with the terms of the conveyance and deed.

The defendants filed a affidavit of merits in which they denied that they had sold or conveyed to plaintiffs the buildings or improvements upon the lots as alleged; denied that they conveyed and warranted the buildings or improvements, or that they had failed in the covenant of warranty, or that a

breach occurred in any covenant in the deed; and further denied that the building on said lots belonged to or was a part of the premises, or that it was real estate, or that it was intended to be conveyed by the deed, or that it was sold or conveyed by the deed; and further denied that defendants failed in their covenant of warranty.

The affidavit of merits further alleged that the building long prior to and at the time of the negotiations preceding the sale and at the time of the delivery of the deed, was in the possession of a third person, who occupied the building and had his office furniture and fixtures therein and had the keys thereto, of which the plaintiffs had notice. Further, that said building was not a part of the real estate and did not belong to the defendants, but that said building was personal property which did not pass with the deed and did not come under the covenant of warranty in the deed.

The affidavit of merits further alleged that said building had been found to be personal property in a certain suit to which the plaintiffs herein were parties, and that said question is res judicata by reason of the judgment therein entered.

The affidavit of merits further sets up that plaintiffs had theretofore brought suit in the Municipal Court upon the same transaction and filed a certain statement of claim therein in which they set up two separate causes of action arising out of said controversy; that the court compelled plaintiffs to elect upon which cause of action they would proceed; that pursuant to the order of the court in that behalf the plaintiffs filed an amended statement of claim in which and by which they elected to proceed in tort; that plaintiffs having made their election to sue in tort for the alleged damages growing out of the transaction, instead of in contract, are now barred from proceeding in this suit and that they are estopped from asserting that the building be-

breach occurred in any covenant in the deed; and further denied that the building on said lots belonged to or was a part of the premises, or that it was real estate, or that it was intended to be conveyed by the deed, or that it was paid or conveyed by the deed; and further denied that defendants failed in their covenant of warranty.

The affidavit of merits further alleged that the building erect to and at the time of the negotiations preceding the sale and at the time of the delivery of the deed, was in the possession of a third person, who occupied the building and had his office furniture and fixtures therein and had the keys thereto, of which the plaintiffs had notice. Further, that said building was not a part of the real estate and did not belong to the defendants, but that said building was personal property which did not pass with the land and did not come under the covenant of warranty in the deed.

The affidavit of merits further alleged that said building had been found to be personal property in a certain suit to which the plaintiffs herein were parties, and that said question is res judicata by reason of the judgment therein entered.

The affidavit of merits further sets up that plaintiffs had therefore brought suit in the Municipal Court upon the same transaction and filed a certain statement of claim thereto in which they set up two separate causes of action arising out of said controversy; that the court compelled plaintiffs to elect upon which cause of action they would proceed; that pursuant to the order of the court in that behalf the plaintiffs filed an amended statement of claim in which and by which they elected to proceed in tort; that plaintiffs having made their election to sue in tort for the alleged damages growing out of the transaction, instead of in contract, are now barred from proceeding in this suit; and that they are estopped from asserting that the building be-

longed to said lots and was a part thereof, and estopped from alleging that the building was covered by the covenants of warranty in the deed.

Upon the issues as thus made up the cause was submitted to the jury with the result stated.

The defendants, supporting their appeal in this court, contend that Georgia S. Gleason is not liable on the covenants in the deed because she joined with her husband, Courtney R. Gleason, in the making of the deed for the sole and only purpose of releasing her dower. They say that the court erred in refusing in evidence a prior deed from Florence L. Page and husband conveying these premises to Courtney R. Gleason and Robert N. Dow, because, it is said, this deed was offered for the purpose of showing that Georgia S. Gleason did not own the real estate and therefore joined in the deed to plaintiffs simply for the purpose of releasing her dower rights. This defense is raised for the first time in this court. It was not set up in the affidavit of merits, nor in offering the evidence rejected did defendants mention the purpose for which it was offered. There is no doubt this would have been a good defense as to Georgia S. Gleason had it been raised in the proper manner on the record. We do not think that it can be raised for the first time in this court.

The defendants, however, further contend that the trial court erred in permitting the introduction of evidence tending to impeach evidence given by the defendant Courtney R. Gleason, who was called by plaintiffs as a witness under section 33 of the Municipal Court Act. Upon such examination he was asked as to statements made by him on a former trial, to which he replied that he did not remember whether he had made such statements. Plaintiffs were afterward permitted over objection to show that he had made these statements. Even if it be conceded that this would have been improper under the usual practice, Luthy & Co. v.

lawyer to grab late and lose a part thereof, and straight line affection that the building was erected by the ancestors of testator in the land.

Upon the issues as then made up the court was instructed to the jury with the result stated.

The defendant, mentioning only errors in this court, moved that George R. Gleason is not liable as the testatrix in the trial proceed the jointed also her husband, Henry C. Gleason, in the making of the land for the sole and only purpose of retaining her dower. Then our this the jury issued in favoring in evidence a prior deed from Florence L. Page and husband conveying their property to Henry C. Gleason and Henry C. Gleason, it is said, this deed was offered for the purpose of showing that George R. Gleason did not pay the real estate and therefore joined in the deed to plaintiff's claim for the purpose of retaining her dower rights. This defense is raised for the first time in this court. It was not set up in the affidavit of merits, nor in offering the evidence rejected did defendants assert the purpose for which it was offered. There is no doubt that would have been a good defense as to George R. Gleason had it been raised in the proper manner on the record. We do not think that it can be raised for the first time in this court.

The defendants, however, further contend that the trial court erred in permitting the introduction of evidence tending to impeach evidence given by the defendant George R. Gleason, who was called by plaintiff as a witness under section 23 of the Municipal Court Act. Upon such examination he was asked as to statements made by him on a former trial, to which he replied that he did not remember whether he had made such statements. Plaintiff's counsel argued and objection to show that he had made those statements. Even if it be conceded that this would have been improper under the usual practice, section 2 in-

Paradis, 299 Ill. 383; Chicago City Ry. Co. v. Gregory, 221 Ill. 591; People v. O'Gara, 271 Ill. 138; Amer. Hoist & Derrick Co. v. Hall, 208 Ill. 597, that rule would not obtain where a party to the suit is called under section 33 of the Municipal Court Act. See Malleable Iron Co. v. Brennan, 174 Ill. App. 38; In re Brown, 38 Minn. 112.

Another point urged is that on the uncontradicted evidence the plaintiffs were estopped by their election in a former case to sue in tort for the same supposed wrong arising out of this same transaction. The defendants offered proof tending to establish this defense, including an amended statement of claim, which upon objection by plaintiffs the court ruled might not be received in evidence. This statement, in substance, alleged that the defendants in that suit, who are the plaintiffs here, had, by means of false representations concerning the ownership of the office building, induced the plaintiffs, who relied upon these representations, to believe that the property belonged to the defendants, and that relying thereon, they had purchased the same, when it did not in fact belong to the plaintiffs, and that it was afterward taken away from plaintiffs by a third person, who was the owner thereof.

It is true that parties may not at the same time pursue inconsistent remedies for the same supposed causes of action. This is an elementary proposition which numerous cases cited on this point by the defendants hold. All of these are easily distinguishable as to material facts from the instant case. The remedy by suit in assumpsit for alleged false representations is not inconsistent, we think, with a suit for a breach of warranty on the deed. There is no basis for an estoppel and the court did not err in refusing to receive the evidence which could have only served the purpose of confusing the jury.

Another phase of this controversy was before this court

Kuwaiti, 245 111. 224; Oklahoma City v. Co. v. Tarkington, 251 111. 1911; Fidelity v. O'Toole, 273 111. 120; Hart-Parr Co. v. Duff, 308 111. 207, that mere words not evidence there a party to the suit is acting under position of of the Supreme Court of the Kentucky Lumber Co. v. Terrell, 174 111. 222, 227; In re Estate, 20 Minn. 111.

Another point urged is that on the preconstructed evidence the plaintiff's case rejected by Single claration is a fatal case he was in error for the same unpaid order relating not of this same transaction. The defendants offered proof tending to establish this defense, including an unsolicited statement of claim, which upon objection by plaintiff, the court right not be received in evidence. This statement, in substance, alleged that the defendants in that suit, who are the plaintiffs here, had, by means of false representations procured the execution of the office building, including the plaintiff's, the title upon false representations, to believe that the property belonged to the defendants, and that relying thereon, they had purchased the same, upon it did not in fact belong to the plaintiff, and that it was afterward taken away from plaintiffs by a third person. The not the owner thereof.

It is true that parties may not at the same time pursue inconsistent remedies for the same supposed course of action. This is an elementary proposition which numerous cases state on this point by the defendants here, all of which are readily distinguishable or in material facts from the instant case. The remedy by suit is necessary for obtaining false representations is not inconsistent, we think, with a suit for a breach of warranty on the deed. There is no basis for an estoppel and the courts do not err in refusing to receive the evidence which could have only served the purpose of confusing the jury.

Another phase of this controversy was below that some

on a former appeal from a judgment in favor of one Wm. Austell, who sued the plaintiffs here, defendants there, in trover for the conversion of the same building, which forms the subject matter of this controversy. Austell v. Benson et al., 218 Ill. App. 646. The defendant Courtney R. Gleason had notice of that suit and was a witness in it. The plaintiff below had judgment and upon appeal to this court we held that as against Austell the plaintiffs here, defendants there, took the property under circumstances which put them upon notice as a matter of law that the building was erected under a contract with the then owner of the premises by which it became goods and chattels for which an action of trover would lie, and that title therefore did not pass to these plaintiffs by virtue of the deed executed and delivered as against the plaintiffs in that suit. The evidence upon which we so held is not before us in this record.

It appears from the undisputed evidence that the building was a frame and stucco building about 20 x 28 feet, placed on concrete pillars, having a general office room, together with a little store room and a closet, and a toilet room; that it was stucco on the outside and plastered on the inside. There was an ordinary wide sidewalk from the street up to the building. The building was about 25 or 30 feet back from the sidewalk. The sewer was connected, and was about as far away as the sidewalk. It was a one story building with a shingle roof. It had a fireplace and a chimney and nine concrete pillars 12 x 12.

It also appears from the testimony of defendant Courtney R. Gleason that after the delivery of the deed in question, one of the plaintiffs complained to him that they could not get into this office and asked him for the keys; that defendant Gleason said that he would take the matter up with his attorney and let him know; that he afterward informed plaintiffs that if the office was attached to the ground by a solid foundation, that he, Gleason, had acquired title from Mrs. Page and had conveyed that title to

on a former appeal from a judgment in favor of our in. matter, the plaintiff here, defendants there, in order to the statutory or the same building, which forms the subject matter of this controversy. Mundell v. Duncan et al., 201 Ill. 449. The defendant Anthony E. Gleason had notice of said mortgage and was a witness in it. The plaintiff below had judgment and upon appeal to this court we held that on against Anthony the plaintiffs here, defendants there, took the property subject to a mortgage which had then upon it, on a motion of his that the building was erected under a contract with the then owner of the premises by which it became part and chattels for which an action of trover would lie, and that title therefore did not pass to plaintiffs by virtue of the deed executed by Anthony as against the plaintiffs in that suit. The evidence upon which we held in that future is in this record.

It appears from the undisputed evidence that the building was a frame and stucco building about 20 x 40 feet, placed on concrete pillars, having a gravel floor. Together with a little store room and a closet, and a table showing that it was assessed on the outside and plastered on the inside. There was an entrance with sidewalk from the street up to the building. The building was about 12 or 14 feet back from the sidewalk. The power was connected, and was about as far away as the sidewalk. It was a one story building with a shingle roof. It had a floor plan and a cellar and also concrete pillars 12 x 12.

It also appears from the testimony of defendant Anthony E. Gleason that after the delivery of the deed in question, one of the plaintiffs mentioned to him that they could not get into this office and asked him for the keys; that defendant Gleason said that he would take the matter up with his attorney and let him know; that he referred plaintiffs that if the office was attached to the ground by a solid foundation, that he, Gleason, had acquired title from Ann. Page and had conveyed that title to

Mr. Benson. "Mr. Benson asked me in our conversation that he should do about taking the office, and I told him I wouldn't advise him what to do, but I know what I would do if I was in his place." This witness does not deny the testimony of plaintiffs to the effect that he said to plaintiff, "The building is yours, I sold you the building, just go out there and get into it, that is all."

We think, on the evidence as it stands in this record, that the deed of the defendants under seal obligated them to deliver the building as a part of the land conveyed. Curtis v. Root, 28 Ill. 375; Meyer v. Schemp, 87 Ill. 471. And the fact that as between the parties to the former litigation this building was held to be goods and chattels does not, in the absence of evidence in this record tending to prove that fact, obligate us to hold that it is not real estate as between the parties here. In each case the mutual intention of the parties is controlling.

Other points assigned and argued are that there was error on the part of the trial court in refusing evidence offered in behalf of defendants, in receiving evidence offered on behalf of plaintiffs, and in the giving and refusing of instructions. All of these become immaterial, however, in view of the conclusion which we have reached upon an examination of the whole record, namely, that on the undisputed facts, and assuming the truth of evidence offered but rejected, the plaintiffs were entitled to recover the amount of the judgment, and it will, therefore, be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

Mr. Somers. "Mr. Somers asked me in our conversation that he should be about taking the office, and I said the I would advise him what to do, but I know what I would do if I was in his place." This evidence was not deny the testimony of Lattin's to the effect that he said to plaintiff, "The building is yours, I hold for the WIDOW, that is my duty and you know it, that is all."

We think, on the evidence as it stands in this record that the act of the defendants under said obligation was to deliver the building as a part of the land conveyed. Little v. Best, 20 Ill. 378; Hoyer v. Lehman, 97 Ill. 471. And the fact that as between the parties to the former litigation this building was held to be proof and chattels does not, in the absence of evidence in this record tending to prove that fact, obligate us to hold that it is not real estate as between the parties here. In such case the mutual intention of the parties is controlling.

Other points argued and urged are that there was error on the part of the trial court in admitting evidence offered in behalf of defendants, in receiving evidence offered on behalf of plaintiffs, and in the giving and refusing of instructions. All of these points material, however, in view of the conclusions which we have reached upon the examination of the main record, namely, that on the undisputed facts, and as making the truth of evidence offered but rejected, the plaintiffs were entitled to recover the amount of the judgment and it will, therefore, be affirmed.

AFFIRMED.

Kennedy, P. J., and Johnston, J., concur.

170 - 28005

A. M. ANDERSEN, Appellee, vs. A. M. KENNING, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment of $471.72 entered upon the finding of the court.

The controversy between the parties grew out of an agreement between the plaintiff and defendant by which plaintiff agreed to do certain construction work upon the premises of defendant situated in Evanston, Illinois. The plaintiff contends, and in his statement of claim alleges, that the contract was a written one, while the defendant contends that it was partly oral and partly in writing. The evidence tends to show that after certain preliminary oral negotiations, the plaintiff on April 12, 1921, addressed a proposal to defendant which in part provided:

"Carpenter Work.

To build new rear porch for dwelling same as present one, except iron railing to be used. Also to furnish and hang four doors (without glass) complete with track and hardware in opening in east wall of garage.

Roofing.

To put new roof on garage with John's-Manville gary hexagonal asbestos shingle with tar paper underneath. Old shingles removed, new valleys hips and ridge.

All work done in a first class workmanlike manner and guaranteed. For the sum of ($1,650) Sixteen Hundred and Fifty Dollars.

No percentage added to roofing and brick work for supervision."

The appellant urges in this court that the statement of claim is insufficient to sustain the judgment because it does not set forth a cause of action, and that the judgment should be reversed for that reason. Gillman v. Chicago Rys. Co., 268 Ill. 305, is cited and relied on to sustain this contention. However, the defendant did not raise any question as to the sufficiency of the statement of claim by motion to strike, or otherwise, but, on the contrary, he filed an affidavit of merits, and the issues made thereby seemed to have been fully tried out. In such a case this court does not reverse a judgment of the Municipal Court for the sole purpose of allowing the parties to make a better pleading.

The principal contention of defendant, however, is that the court erred in excluding competent and material evidence which was offered in behalf of the defendant.

One matter of controversy between the parties was with reference to the removal of the old shingles on the garage. Plaintiff sub-let the roofing to another company, which put new shingles on the main roof but not upon the gables and the dormer windows. The defendant claims that under his arrangement with the plaintiff all the old shingles on the garage were to be removed and new ones supplied.

Another matter of controversy referred to the doors of the garage. The old doors were 2-3/8 inches thick. Plaintiff proposed to furnish doors which were only 1-3/4 inches thick. The defendant contends that this was not in accordance with the terms of the contract and claims that the doors were not sufficiently heavy to work satisfactorily and keep out the cold.

In the course of the trial the defendant offered evidence tending to show that it had been orally agreed between plaintiff and defendant at the time of the making of the con-

The appellant argues in this court that the evidence of claim in insufficient to sustain the judgment because it does not prove facts - some of claims, and that the judgment should be reversed for that reason. Gallman v. Indepo Ins. Co., 32 Ore. 111, 50, in which one relied on to sustain this contention. However, the defendant did not make any question as to the sufficiency of the statement of claim by motion to strike, or otherwise, but, on the contrary, he filed an affirmative of merits, and the issues with another answer of been fully tried out. In such a case this court does not review a judgment of the lower court for the sole purpose of allowing the parties to make a better showing.

The principal contention of defendant, however, is that the court erred in excluding competent and material evidence which was offered in behalf of the defendant.

The matter of controversy between the parties had reference to the removal of the old adjoining on the premises. Plaintiff asserted the rights to another concrete, which put two buildings on the back road but not upon the public and the street window. The defendant claims that under his arrangement with the plaintiff all the old materials on the premise were to be removed and for that purpose.

Under matter of controversy (illegible) in the state of the crime. The old house was 8-ft. large- side. Plaintiff proposed to retain more which was only 1-1/2 inches high. The defendant contends that this was not in accordance with the terms of the contract and claims that the house was sufficiently heavy to work satisfactorily and keep out the wind.

In the course of the trial the defendant offered evidence tending to show that it had been orally agreed between plaintiff and defendant at the time of the making of the con-

tract, that the doors to be furnished were to be of the same thickness as the old doors, and also that all the shingles on the garage were to be replaced, and further offered evidence as to what the reasonable cost of making these improvements according to the oral understanding would be. The court excluded this evidence.

The plaintiff contends that the ruling of the court was correct because the written proposal and the letter of acceptance made a complete contract between the parties, that there was nothing ambiguous about the obligations created by the contract, and that parol evidence was therefore not admissible for the purpose of showing what the actual contract of the parties was.

That oral contemporaneous evidence is not admissible generally to verify the terms of a written contract is an elementary proposition, but there are many exceptions to and modifications of the rule.

The defendant contends in this case that the written contract sued upon was incomplete and ambiguous; that it was only intended as an estimate of the cost of the work to be done as outlined by the defendant in a prior interview which he had with plaintiff concerning the work.

It is undoubtedly the law that parol evidence is admissible in order to make clear the intent of the parties where written language leaves the terms of a contract uncertain, ambiguous or incomplete. Stone v. Mulvaine, 217 Ill. 40; Bolton v. Muling, 195 Ill. 384; Irwin v. Powell, 188 Ill. 107; Hedrick v. Monovan, 248 Ill. 479. Indeed, we think it will usually be found to be true that a building contract or a contract for repairs upon buildings, such as form the basis of this suit, in the absence of specifications, and no specifications

itself, that the terms to be introduced were to be of the same tenderness as the old terms, and also that all the changes in the prices were to be regulated, and further offered evidence as to what the reasonable cost of making these improvements according to the usual understanding would be. The court rejected this evidence.

The plaintiff contends that the making of the course was governed by a written proposal and the letter of acceptance made a complete contract between the parties, that there was nothing material that was negotiated outside the contract, and that parol evidence was admissible for the purpose of showing what the custom of the parties was.

Parol and contemporaneous evidence is not admissible generally to vary the terms of a written contract in an elementary proposition, but there are many exceptions to and modifications of the rule.

The defendant contends in this case that the written contract must upon its incomplete and ambiguous; that it was only intended as an estimate of the cost of the work to be done as ordained by the defendant in a prior interview which he had with plaintiff concerning the work.

It is unnecessarily the law that parol evidence is admissible in order to make clear the intent of the parties where written language leaves the terms of a contract uncertain, ambiguous or incomplete. Stone v. Bolivar, 97 Ill. 61; Bolton v. Tribune, 198 Ill. 384; Irwin v. Lynch, 198 Ill. 107; Hartzick v. Donovan, 242 Ill. 479. Indeed, we think it will usually be found to be true that a building contract or a contract for repairs upon buildings, such as fixes the basis of this suit, in the absence of specifications, and no specifications

were attached to the contract here, will usually be found to require the introduction of oral evidence in order to ascertain the intention of the parties. We think under this exception to the rule, that the evidence offered but excluded with reference to the kind of doors which were to be furnished for the garage was clearly admissible. The contract simply states that the contractor shall "furnish and hang four doors (without glass)." The question at once arises as to what kind of doors, of what size, of what material, etc. We look in vain to the written contract for any word, or words, from which this important and necessary information could be gathered. Looking at this contract alone and without the aid of oral evidence to interpret it, we know only the number of and the fact that doors are to be put in; the kind and quality are wholly undetermined.

The provision of the contract with reference to the removal of the shingles is likewise ambiguous. It says, "Old shingles removed." How many and from where? It might be inferred from that part of the contract which provides that a new roof is to be put on the garage, that the old shingles would necessarily be removed from the roof, but it is by no means clear that it was the intention of the parties that these should be the only shingles removed. The only way in which the intention of the parties could be made clear would be by the introduction of oral evidence, in case there was any competent oral evidence which would clear up the ambiguity. Such evidence was offered by the defendant and rejected.

Without discussing all the items in detail, it is clear that the court made a finding which could not have been properly made if the contentions of the defendant as to the alleged oral conversations were found to be true. It is unnecessary to discuss other alleged errors. For the reasons indicated the judgment is reversed and the cause remanded.

McSurely, P. J., concurs. REVERSED AND REMANDED

were attached to the document here, will usually be found to require the introduction of oral evidence in order to ascertain the intention of the parties. In light under this assumption is the truth, that the evidence offered but excluded with reference to the kind of doors which were to be furnished for the grange was clearly admissible. The document simply states that the carpenter should "hang two doors (without glass)." The question at once arises as to the kind of doors, or what sort, or what material, etc. We look in vain in the written instrument for any word, or words, from which this important and necessary information could be gathered. Looking at this document alone and disregarding the use of oral evidence to interpret it, we know only the number of and the fact that doors are to be put in; the kind and quality are wholly undetermined.

The provision of the contract with reference to the removal of the shingles is likewise ambiguous. It says, "old shingles removed." How many and from where? It might be inferred from this part of the contract with previous that a man had to be put on the grange, that the old shingles would necessarily be removed from the roof, but it is by no means clear that it was the intention of the parties that these would be the only shingles removed. The only way in which the intention of the parties could be made clear would be by the introduction of oral evidence, in case there was any competent oral evidence which would clear up the ambiguity. Such evidence was offered by the defendant and rejected.

Taking all concerning all the items in detail, it is clear that the court made a finding which could not have been properly made if the contentions of the defendant as to the alleged oral conversations were found to be true. It is unnecessary to discuss other alleged errors. For the reasons indicated the judgment is reversed and the cause remanded.

McCurdy, P. J., concurs.

187 - 28022

PARISTYLE NOVELTY COMPANY, a corporation, Appellee, vs. NATIONAL TRADING COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in the sum of $3,363.60 entered upon the verdict of a jury after motions for a new trial and in arrest of judgment had been overruled. The court upon the motion for a new trial, however, required a remittitur of $294.57.

The statement of claim alleged that on or about May 22, 1919, plaintiff gave to defendant two orders for 2,000 gross of human hair cap nets at the price of $2.95 per gross; that defendant had failed to deliver 1,550 gross of the number so ordered, to the damage of the plaintiff.

The affidavit of merits admitted that plaintiff and defendant entered into the two contracts in writing dated May 22, 1919, for the sale of hair nets as alleged, but set up by way of defense that defendant at the time of the making of the contract was an import broker, known to be such by all engaged in the trade; that the plaintiff at the time the contracts were entered into knew that the hair nets in question were to be imported by the defendant from China, and knew that the defendant had no hair nets on hand at the time of the making of the contracts with which to make delivery thereof, but that the hair nets were to be received and imported by the defendant from China during the period provided for delivery; further, that

the contracts provided "that seller was not responsible for consequences of strikes or other causes beyond its control;" that after the contracts were entered into, labor conditions suddenly developed in China to such an extent that the exporters generally from whom the hair nets were to be procured refused to make delivery on orders placed with them and refused to guarantee deliveries during any of the period provided for delivery on the contracts sued upon; that the defendant was unable (because of labor conditions in China and because of the general pilferage and stealing of the product by the natives of China who were making said hair nets for said exporters during the period provided for in said contracts) to procure hair nets provided for in the contracts during the period provided for the delivery of the same, and that the defendant did not have any control whatever over said conditions.

The affidavit of merits further alleged that defendant had advised the plaintiff during the period of time provided for delivery of the hair nets of its inability to procure the same; that plaintiff agreed to waive the conditions of the contracts requiring the defendant to make delivery of the hair nets during the period provided for delivery in the contracts.

Upon issues thus made the cause was submitted to the jury.

The defendant here alleges errors on the record in that the court made improper remarks, denied a motion of the defendant to strike out incompetent evidence given by the witness Austern as to the market value of hair nets in April, 1920, and in receiving evidence of the value of goods and consequent damages by failure to deliver in April, 1920.

Arguing this last proposition the defendant says that it was the duty of the plaintiff when it declared a breach and

the contracts provided "that neither was not responsible for consequences of strikes or other causes beyond its control;" that after the contracts were entered into, labor conditions suddenly developed in Ohio to such an extent that the courtesy generally from whom the bulk were to be procured refused to make delivery on orders placed with them and refused to guarantee deliveries during any of the period provided for delivery on the contracts and upon; that the defendant was unable (because of labor conditions in Ohio and because of the general dislocation and stoppage of the product by the strikes of labor) to procure bulk was also were willing with bulk was for said expenses during the period provided for in said contracts) to procure bulk was provided for in the contracts during the period provided for the delivery of the same, and that the defendant did not have any control whatever over said conditions.

The affidavit of merits further alleged that defendant had strived the plaintiff during the course of time provided for delivery of the bulk was of its inability to procure the same; that plaintiff agreed to waive the conditions of the contracts requiring the defendant to make delivery of the bulk was during the period provided for delivery in the contracts.

Upon issues thus made the cause was submitted to the jury.

The defendant has alleged errors on the record in that the court made improper rulings, denied a motion of the defendant to strike out incompetent evidence given by the plaintiff, admitted in the market value of bulk was in April, 1920, and in receiving evidence of the value of goods and consequent damages by failure to deliver in April, 1920.

Arguing this last proposition the defendant says that it was the duty of the plaintiff when it declares a breach and

put defendant in default, to use every reasonable effort to mitigate the damage; that the default, if default it was, in the delivery occurred in June, July, August, September and October of 1919, and it was, therefore, error to receive in evidence proof as to the market value of these goods in 1920 for the purpose of establishing the amount of plaintiff's damages.

Immediately following the date upon which the first order was given and up to April 22nd of the following year, there was a continuous correspondence between the parties with reference to the delivery of these goods; the plaintiff requesting deliveries from time to time and the defendant giving excuses for its failure to deliver more than a small part of the amount of goods called for by the contracts. This correspondence, which we have carefully examined, shows that while the original delivery was to have been made in the latter months of the year 1919, the same was postponed by mutual consent at the request of defendant.

On April 13, 1920, the plaintiff wrote defendant:

> "Under the circumstances, we have decided to wait no longer, and must insist on the immediate delivery by you of a substantial part of the balance 1550 gross due us by you, and the remainder within a very short time thereafter, in default of which we propose to take steps to recover from you our damages. We are ready, able and willing to pay for all the merchandise, and your money is ready for you."

On April 16, 1920, the defendant replied to this letter, in substance, demanding the price of $6.00 per gross less 2% for cash, and the arranging of an irrevocable letter of credit through the bank before shipment would be made.

On April 19, 1920, the plaintiff replied, insisting upon delivery of the remainder of the two orders at $2.95 per gross according to the terms of the contracts, and on April 22nd defendant replied:

per defendant is liable, to an very reasonable effort to mitigate the damage; in the final, if anything is you, in the delivery country is Base, July, August, September and October of 1929, and it was, therefore, error to receive in evidence proof as to the market value of these goods in 1928 for the purpose of establishing the amount of plaintiff's damage.

Respectfully filewith the ship upon the flat error are given not as to every item of the following goods, there was a continuous misrepresentation between the parties affirmed to the delivery of these goods; the plaintiff demurring delivering from time to time and the defendant giving excuses for the failure to deliver more than a small part of the amount of goods called for by the contracts. This misrepresentation, which as have carefully examined, shows that while the original delivery was to have been made in the latter months of the year 1928, the same was postponed by mutual consent at the request of defendant.

On April 12, 1929, the plaintiff wrote defendant:

"Under the circumstances, we have decided to wait no longer, and must insist on the shipping delivery in pay of a substantial part of the balance from Cross Cove as by now, and the remainder within a very short time thereafter. In a fight of right we prefer to take ships to receive from you our damage. We are ready, also and willing to pay for all the merchandise, and your money is ready for you."

On April 16, 1929, the defendant replied to this letter, in substance, demanding the price of $3.00 per gross less 3% for cash, and the arranging of an irrevocable letter of credit through the Bank before shipment could be made.

On April 17, 1929, the plaintiff wrote, insisting upon delivery of the remainder of the Cove estate at $4.50 per gross subject to the terms of the contract, but it until the letter was written.

> "As far as the price of $2.95 per gross is concerned, we believe that we outlined reasons in our letter of Oct. 21st, which explained why this price is long since obsolete and ineffective. Consequently, we are at a loss to understand why you continue to dwell on it."

The rule of law is that where a delivery is postponed by agreement between the parties, the measure of damages is the difference between the contract price and the market price at the time the article is deliverable by the subsequent agreement, and where the postponement is for an indefinite time, the measure of damages is the difference between the contract price and the market value at a reasonable time after performance is demanded. Summers et al. v. Hibbard, Spencer, Bartlett & Co., 153 Ill., 102. Northwestern Iron & Metal Co. v. Hirsch, 94 Ill. App. 579. Baringer v. Imp. Cotton Mill Company, 164 Ill. App. 467. Houston v. Sendnagel, 135 Ill. App. 95. We think that rule applicable to the facts appearing here, as the correspondence, which is too lengthy to discuss in detail, shows continuous requests by the defendant for an extension of the time of delivery, and a reluctant acquiescence on the part of the plaintiff in these requests up to the time that defendant practically repudiated its obligations. We think the court did not err in receiving this evidence.

As to the alleged prejudicial remarks of the trial judge, it is sufficient to say that the record fails to show any objection made by defendant at the time of the remarks complained of. We, therefore, cannot give the matter consideration on its merits. Pegram v. Mutual Protective League, 159 Ill. App., 314. Farrell v. Bruce, 190 Ill. App. 309. Mulliner v. Bronson, 114 Ill. 510; Bank. & Ill. River R. R. v. Chester, 62 Ill. 235.

It is further argued, however, that the court erred in refusing evidence offered by the defendant tending to show labor conditions in China in the hair net industry at and prior to the

"As far as the plaintiff's prayer is concerned, we believe that a mandatory decision in our latter or our. Also, which existence may this prime is long since obsolete and inoperative. Consequently, we are not a bond be construed by our decision to avail to it."

The rule of law is that where a delivery is performed by agreement between the parties, the measure of damages is the difference between the contract price and the market price at the time the vehicle is delivered by the manufacturer, and where the performance is to be rendered in the future, the measure of damages is the difference between the contract price and the market value at a reasonable time after performance is demanded. Cummins et al. v. Whitford Motor Products & Co., 10 Ill. App. 3d, Partnerships Long & Total Co. v. Strong, 6 Ill. App. 4th. Partnerships v. Ben, Inline Will Company, 364 Ill. App. 4th. Partnerships v. Kindmund, 136 Ill. App. 2d. We think the rule applicable in the facts appearing here, in the arrangement, which is too lengthy to discuss in detail, show continuous requests by the defendants for an extension of the time of delivery, and a reluctant acquiescence on the part of the plaintiff in their behalf, in the hope that defendants practically repudiated the obligation. In fact the evidence does not go to indicate this evidence.

As to the alleged prejudicial remarks of the trial judge, it is sufficient to say that the remarks fully in answer objections made by counsel at the time of the remarks complained of. The Appellate, moreover, gives the matter consideration on its merits. Fuller v. Indust Distributor Company, 220 Ill. App. 4th. Kindmund v. Brown, 136 Ill. App. 2d. Williams v. Brown, 111 Ill. App. Bank, 4 Ill. Appt. 2d. v. Grafton, 22 Ill. App.

As is further argued, however, that the jury erred in refusing evidence offered by the defendant tending to show other conditions in Idaho in the hair net industry at and prior to the

time when delivery was to be made according to the terms of the contracts, and also in connection therewith, excluding other evidence offered tending to show that the clause in the contracts, "seller not responsible for the consequences of strikes or other causes beyond their control," by reason of a well recognized rule or custom generally understood in the trade at the time the contracts were made, relieved defendant of its obligation to deliver under the conditions which existed.

There was no evidence tending to show that what is technically known as a strike existed in China at this time. Indeed, defendant's own witness testified that under social conditions as the same existed there, a strike was impossible. Defendant made an offer to prove by a commerce report of the American Consul stationed in the Chefoo District in China, and by the testimony of its president who visited China at the time in question, that due to the industry being disrupted, deliveries were much slower than had been anticipated; that secondary contracts made in the United States remained unfilled; that the jobbing importers, apparently not understanding the conditions ~~xxixing~~ existing in the province where these hair nets were made, became impatient and attempted to secure the nets directly from the workers by sending buyers from Shanghai to the principal producing area along the Shantung railway in the region of Chingchowfu; that this gave the workers a false impression as they were offered higher prices than they had been receiving from the Chefoo exporters to whom they were bound by contracts; that the result of this was the repudiation by the workers of practically all contracts with Chefoo exporters, and the direct sale of nets, which were not their property, to the buyers from Shanghai; that following this the exporters declared their inability to meet their obligations, and although for a time they bought nets on the market at ruling prices in an effort to meet their shipping

time when civilization was to be made accessible to the masses of the country, and also in economical Chemistry, concerning which evidence offered tending to show that the change in the composition, "sellers were responsible for the consequences of bribes or other means bought their monitors," by reason of a well recognized rule or method generally understood in the trade at the time the contracts were made, relative to the obligation to sellers under the specifications with regard.

There was no evidence tending to show that what is technically known as a visible method in China at this time. Indeed, Informants who witness testified that only metal was shipped on the same evidence there, a trade was impossible. Technical such an effort is given by a competent witness of the Chemical Journal chemistry in the Chemical laboratory in China, and by the testimony of the witness who visited China at the time in question, that may be the industry being disrupted, motivation were much slower than has been anticipated; that economic conditions made in the United States remained unfilled; that the jobbing business, apparently not contemplating the contracts entering relating in the province where these half mile were made, Chinese Industrial and Chemical, to secure the sale directly from the workers by sending imports from Shanghai to the principal provinces area along the Chemung railway in the region of Chingkiang; that this year the markets a false impression as they were offered higher prices than they had been receiving from the Chefoo operators to some they were found by contracts; that in result of this was the capitulation by the workmen of practically all contracts with Chefoo operators, and the direct sale of mile of mile, which were not their property, to the buyers from Shanghai; that believing this the experience Chinese Chemist inability to meet their obligations, and although for a time they bought from on the market at raising prices in an effort to meet their obligations

obligations, they were soon compelled to desist, as in many cases the firms to whom they were obligated to ship were actually competing with them in the purchase of the finished nets in the district. We have no doubt that this commerce report was properly excluded. It was not a public record and to have permitted it in evidence would have deprived the plaintiff of its right to cross-examine upon the facts set forth.

Nor do we think the court erred in excluding the offered evidence as to the alleged custom. While it is true that evidence of a general custom existing in the trade, which is generally known and understood by all persons in the trade at the time a contract is made, will be presumed to have been within the contemplation of the parties contracting in regard to a subject matter to which the custom is applicable, it is also true as a general rule, and this, we think, is the rule applicable here, that evidence of such a custom or usage will never be received where it is repugnant to the terms of an express contract, that it is not permitted to operate against the express terms of a contract where such terms are plain, unequivocal, and not in any sense ambiguous. The Supreme Court has so held in a case upon which defendant relies. Al Reno Grocery Company v. Stocking, 293 Ill. 494. Moreover, in this case the defendant did not set up any such alleged custom in its affidavit of merits, and, therefore, irrespective of other reasons, we think the objections were properly sustained on this account.

Appellant says that the trial court erroneously supposed that the rule of ejusdem generis was applicable to this clause of the contracts, and says that because the term "strikes" exhausts the genus, the rule that general language must be limited to the specific clauses or things enumerated, would not be applicable as the court thought it was. The theory of the trial judge is, of course, immaterial. We are concerned only with the question of

obligations, they were more compelled to insist, so is more cause for fear to those who were obliged to stop even momentarily competing with them in the production of the finished goods in the interior. We have no doubt that this economic report was primarily confidential. It was not a public report and to have permitted it as evidence would have lessened the clarity of the right to choose, resting upon the facts and terms.

For us we hold the court should be reversing the admitted evidence as to the illegal action. While it is true that ordinarily cases of a general nature and not the trade, which is generally known and understood by all persons in the trade, where a conspiracy is made, will be presumed to have been within the contemplation of the parties contracting in regard to a religious matter as using the matter in question. It is also true in a general way, that Ohio, as to trade, is the only jurisdiction that, Ohio statutes of which a matter will never be considered where it is necessary to the issue of an injunction restraint. But, it is not necessarily to operate against the express terms of a contract where such terms are plain, unambiguous, and not in any sense ambiguous. The opinion cited has as its in a case upon which it rendered relied. In_re_Ohio_Tool_Co. v. Brockhoff, 188 Ill. 548. However, in this case the defendant did not set up the such alleged market in its contract of service, and, therefore, irrelevant of other reasons, we think the objections were properly overruled on this account.

Appellees argue that the trial court erroneously assumed that the rule of _rights_ _of_ _property_ was applicable in this case of the contract, and cite that because the term "trade" commonly the _meaning_, the rule that property rights may be limited to the specific objects or things mentioned, would not be applicable to the court thought it was. The theory of the trial judge is, or seems, based on the contract only with the exception of

whether the conclusion reached was correct. We think that all the evidence of this kind offered, namely, that of the supposed custom, and of the conditions in China as detailed by the witness who personally visited that country and as shown in the commerce report, was very properly excluded for another and controlling reason. Neither the evidence of the witness who made the personal visit, nor the report of the consul, tended to show that the conditions pleaded in extenuation of defendant's failure to deliver existed in April, 1920, at which time the defendant first in toto repudiated its contracts. It affirmatively appears from all the evidence that the only thing which prevented a delivery of the hair nets contracted for when demanded in April, 1920, was the fact that prices therefor had gone up. Indeed, this is fairly inferable from all the evidence and there is no evidence in the record that anything except the price at that time stood in the way of defendant getting all the hair nets called for by its contracts. Substantial justice has, therefore, been done in this case and the judgment is affirmed.

AFFIRMED.

McCurely, P. J., and Johnston, J., concur.

whether the legislature would ever accede. In fact was all the evidence of this kind different, simply, that of our organized forces, and of the conditions in China as detailed by the witnesses who personally visited that country and is shown in the summaries herein, was very properly admitted for another and conflicting reason. Neither the evidence of the witnesses who saw the personal visit, nor the report of the commission, intended to show that the conditions placed an attempt of "commercial" children to enter schools in vain, but, on which time the "Chinese Slave in fact" organization did continue. It critically remains from all the evidence that the only thing which prevented a delivery of the girls was manifested for which evidence in court, that, was the fact that police reserves had been on. Indeed, this is clearly determined from all the evidence and there is no evidence in the record that anything except the police at that time stood in the way of children getting out to their new owner's homes. Substantial justice has, therefore, been done in this case and the judgment is affirmed.

Affirmed.

Respectfully, F. L., and Johnson, J., concur.

209 - 28044

ELIJAH K. BROWN, Doing Business as E. K. Brown & Co.,
Appellee,

vs.

ALBERT O'ROURKE,
Appellant.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $500 entered upon the verdict of a jury.

The declaration of plaintiff alleged that he was a licensed real estate broker; that defendant desired to find a purchaser for certain property and agreed with plaintiff that if the plaintiff would procure a person ready, willing and able to buy said premises, he would pay plaintiff 50 per cent of any commission defendant should receive for selling the same; that plaintiff procured such a person and that defendant sold or caused the premises to be sold to the purchaser procured and received as commission therefor the sum of $1500, whereby he became indebted to the plaintiff in the sum of $750. The common counts were added.

To this declaration the defendant filed a plea of the general issue with an affidavit of merits, in which he states that the property mentioned was listed with the plaintiff, but not exclusively, at a certain definite price; that the plaintiff did not get a purchaser ready, willing and able to purchase at that price, but instead abandoned his efforts to sell the property; that later the property was sold through the efforts of a real estate broker other than the plaintiff.

A large number of cases are cited to sustain proposi-

tions of law upon which the defendant relies, and about which there is little dispute. We think the cases relied on are easily distinguished from this one, and that the controlling questions in the case arise on the issues of fact as to whether the property was listed with the plaintiff exclusively, whether plaintiff secured the purchaser ready, willing and able to buy, or whether the plaintiff abandoned his efforts to sell the property.

We have examined the evidence bearing upon all these points and are inclined to hold that the jury was justified in finding for the plaintiff as to each one of them. Clearly we can not say that the verdict is against the weight of the evidence with respect to any one of them.

The evidence of plaintiff tended to show that in January, 1921, plaintiff called on defendant with reference to the sale of the property in question, a warehouse on East Sixty-third street; that defendant told plaintiff that he, defendant, was the exclusive agent for the sale of the premises and that his price was $65,000; that defendant gave plaintiff an order for the key to the building and that plaintiff inspected it and again saw defendant and told him that the building was not worth $65,000; that plaintiff asked defendant if any other broker was working with him and defendant replied, "You have my assurance that nobody will interfere with you;" that thereafter plaintiff called on Mr. Goldboss, the principal owner of the Home Furniture Company; that Goldboss said to him that he was interested; that plaintiff repeatedly called on him about the matter; that Goldboss finally inspected the building and promised plaintiff an answer in a few days; that after trying several times to reach Goldboss plaintiff finally got in touch with him by telephone, when he was informed that while defendant, when called on, had given a price of $60,000 on the building, another broker had offered to deliver

items of law upon which the plaintiff relies, and some minor issues in little dispute. In their two cases relied on are mainly illustrated from this one; one case has considerably resembled the case before us in the issues of fact. In stating the principle was fixed with the quantity accordingly, counsel claimed amount the performer such, failing and also in fact, so therefore the plaintiff abandoned his efforts in part the property.

We have considered the evidence bearing upon the three points and are inclined to hold that the jury was justified in finding for the plaintiff as to each one of them. Briefly we can not say that the trial is against the weight of the evidence with respect to any of the issues.

The evidence of [illegible] Smart, Jr., plaintiff relied on testimony with reference to the sale of the property to Crosby, a witnesses on that subject testified that [illegible] was the executive agent for the sale of the property and that the price was $28,000; that personal care plaintiff in order was the day in the building and that plaintiff insured in his name and defendant and tell him that the building was not worth $28,000; that plaintiff owned property of any other insure the building with him and defendant replied, "You have my assurance that nobody will interfere with you." that [illegible] plaintiff replied so to, Baldwin, the principal owner of the Home Furniture Company; and Baldwin said to him that he was interested; was plaintiff; repeatedly called on the owner the matter; that witness Crosby insured the building and provided plaintiff an answer in a few days; that after trying various ways to reach Baldwin plaintiff finally got in touch with him by telephone, then he for interested that while defendant, when called on, had given a price of $20,000 on the building, neither Baldwin nor defendant in making

it for the sum of $50,000; that plaintiff then saw defendant at his office and asked him if Goldboss had offered him $50,000 for the property and defendant replied that he had, but that defendant could not deliver to him at that price, and had so informed Mr. Goldboss; that defendant asked plaintiff to see Goldboss and try to get him to raise the price; that plaintiff did so and that Goldboss told him that another broker had offered to deliver for $50,000, and that plaintiff could not expect him, Goldboss, to raise the price under the circumstances; that plaintiff repeated this conversation to defendant the following Monday morning and told defendant that he had broken faith with him in peddling the property all over town - "And I says, 'It appears to me that there has been a careless conduct in the handling of this property, and therefore,' I says, 'I want to know where I stand. Mr. Goldboss is my client and I hope you won't forget it;'" that Mr. O'Rourke answered him, "Yes, I have made a blunder and the best thing to do is to call the other party off so that you will be able to deliver the property to Mr. Goldboss."

Plaintiff testifies that on the 26th of March thereafter defendant told plaintiff that he had sold the property to Goldboss for $50,000 and promised to take care of plaintiff's share of the commission when defendant got it. Plaintiff further testified that in the beginning of the transaction it was agreed that the amount of his compensation should be 50 per cent of such commission as the defendant received, and the uncontradicted evidence shows that after the sale was consummated the defendant received $1500 from the owner as commission.

The plaintiff is corroborated in his testimony by Goldboss, who says that the property was originally suggested to him by plaintiff, and that he made his final offer of $50,000 to the plaintiff for the property; that in the meantime another

broker, one Coplansky, called on him and that the deal was closed with defendant and Coplansky.

The plaintiff is also corroborated in material parts of his testimony by his son, who says that he was present at a conversation between plaintiff and defendant in the first week of March, when plaintiff told defendant that he did not like the manner in which defendant was handling the matter, that defendant knew he was not acting right, that Goldboss was plaintiff's client, that plaintiff had made the inspection with him, and that in all justice it would not be fair to let anyone step in. This witness says that defendant replied that he would take the matter away from the other broker and would call him off, and asked plaintiff to go and try to get Goldboss to raise to at least $55,000. He says that plaintiff replied, "I will go and call on Mr. Goldboss tomorrow."

Defendant, on the contrary, testifies that nothing definite was said at his first conversation with the plaintiff except that he would share a commission if plaintiff procured a purchaser, but positively denies that anything was said about not listing the property with other brokers. He says that Goldboss came in to see him and said he might be interested in the property at $50,000; that he (defendant) told him that the owner wanted $60,000, but that he would see the owner and see what he could do for him, and afterward wrote Goldboss that the owner refused to consider that price, "but that I would continue my negotiations with him with the idea of getting him down." He says that he never saw plaintiff after that and denies that he asked plaintiff to go to Goldboss to try and get the price up. He admits a conversation between himself and the plaintiff, at which plaintiff's son was present, but says that the property had been in fact sold at that time.

The contention of the defendant that plaintiff's own testimony shows that he had abandoned his efforts to sell the property is based upon a statement in the evidence given by Mr. Goldboss to the effect that at the time when plaintiff sought to get him to increase his price to $60,000, which Goldboss refused to do, plaintiff said to Mr. Goldboss that if he, Goldboss, would not buy it at $60,000 that he (plaintiff) was through. This voluntary statement, however, made by the plaintiff at a time when he was using his arts as a salesman to induce the prospective purchaser to give a larger price, comes far short, we think, of establishing an abandonment. That remark was made to Goldboss, not to the defendant, and the evidence of Goldboss, plaintiff and plaintiff's son all tends to show that notwithstanding that statement the plaintiff did continue in his efforts to make a sale of the property.

Whether the plaintiff was the procuring cause of the sale and whether he abandoned the undertaking, were, under the evidence, questions of fact for the jury. Reed v. Young, 146 Ill. App. 210; Grennerhous v. Taylor, 195 Ill. App. 165; Ogren v. Mundell, 220 Ill. App. 584.

A clear preponderance of the evidence indicates that plaintiff produced the customer, and the fact that defendant continued the negotiations which plaintiff had begun to the final consummation, would not prevent the plaintiff from being the procuring cause of the sale, although the property was sold at a different price from that at which it was listed. Hessling v. Frey, 182 Ill. App. 547; Elser v. Hughes, 183 Ill. App. 188; Bennis v. Victoria, 184 Ill. App. 500; Hafner v. Herron, 165 Ill. 242; Rigdon v. More, 226 Ill. 382.

Cases cited by defendant to the proposition that "as between brokers, the broker who first procures a customer is entitled to the commission to the exclusion of other brokers," are

not, we think, applicable to the facts of this case.

Defendant also argues that the motion in arrest of judgment should have been granted for the reason that the declaration is so defective that it will not be aided by verdict. No cases are cited in support of this contention, and we think it is without merit. Probably the declaration would have been found defective upon demurrer, but the question is not raised in that manner. We think it was good after verdict. Moreover, the common counts were added to the declaration and the testimony for plaintiff tended to prove a case upon which recovery might have been had under the common counts.

It is further argued that a new trial should have been granted because, it is said, there was no evidence which would warrant a verdict for $500. It is true that under the evidence the verdict should have been for half the amount of the commission received by plaintiff, which would have been $750; but we think defendant has no reason to complain because the jury saw fit to make him a present of $250, which it ought not to have done.

Complaint is also made that certain evidence based upon a diary kept by plaintiff was admitted in evidence, notwithstanding plaintiff's testimony that he did not have an independent recollection as to the specific dates of certain transactions other than the diary, while this diary was not produced in court in order that the plaintiff might be cross-examined upon it. The record shows, however, that later in his testimony plaintiff testified that he did have such independent recollection of the facts, and, we think, there was no reversible error in this respect. If defendant desired the production of the diary, there was a way in which he might have secured it. He did not elect to choose that way.

Complaint is also made that the court ruled that it

would grant a motion of plaintiff to withdraw a juror after the court had announced that it would grant a motion made by defendant for a directed verdict at the close of plaintiff's evidence. When the court so ruled the parties agreed to proceed with the case and certain material evidence which plaintiff had overlooked was given. We think this matter was in the discretion of the court, and that under the circumstances the discretion was not abused.

Complaint is also made with regard to the instructions given and refused. We have examined the same and are constrained to hold that there was no reversible error in this respect. Indeed, we are satisfied that substantial justice has been done and the judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

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| 2052

HENRY S. BLUM and
FRED C. EHMAN,
Appellants,

vs.

HARRISON M. PARKER,
Appellee.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiffs, Henry S. Blum and Fred C. Ehman, from a judgment entered in favor of the defendant, Harrison M. Parker. The judgment was entered by the court upon the verdict of a jury.

The action of the plaintiffs was in assumpsit. Damages were claimed in the sum of $80,000 for the alleged breach by defendant of the terms of a written contract whereby, so it was alleged, plaintiffs agreed to sell and defendant to buy "all the right, title and interest" of the plaintiffs in certain shares of stock of the Workers' Publishing Society, and in consideration of which, and for all services rendered by the plaintiffs, defendant agreed to pay the sum of $60,000 in cash, or, at his option, $66,000 in notes to mature at the time specified.

The declaration was in two counts. The first count was based upon the theory of a completed performance of the alleged contract by the plaintiffs, and the second count was based upon the theory of the tender and offer of delivery on their part. The common counts were added to the declaration and to these the defendant filed a plea of the general issue with an affidavit of merits, and a general demurrer to the first and second counts. This demurrer having been overruled, the defendant filed certain pleas, which upon demurrer interposed by plaintiffs were sustained. Thereafter defendant filed eight special pleas setting up want of

consideration, failure of consideration, etc.

The sixth plea set up the principal defense relied upon at the trial, which was to the effect that plaintiffs and defendant had entered into an agreement that defendant should enter into negotiations with W. D. Boyce in behalf of plaintiffs and the defendant for the sale of these 15,200 shares of stock, provided plaintiffs and defendant could secure the right, title and ownership of the stock from the Workers' Publishing Society or Local Cook County of the Socialist Party; that the writing upon which plaintiffs sued was made pursuant to that undertaking, and that simultaneously with the execution of that contract and as part of the same transaction, the defendant Parker and the plaintiffs Blum and Ehman executed a further written agreement to the effect that Blum and Ehman agreed to buy all the right, title and interest of Parker in and to this stock. In other words, the provisions of the first part of the contract were alleged to have been reversed. The supposed second writing is set up in the plea <u>in haec verba</u> and states:

> "This writing is made to release Harrison M. Parker from any liability which may exist under the writing where Harrison M. Parker agrees to buy the stock mentioned in the writing which is executed with this, for purposes which are mutually understood between us."

The parties upon the trial submitted to the jury evidence tending to sustain their respective contentions and the verdict of the jury was in favor of the defendant upon the issues of fact as thus made. That verdict has been approved by the trial court, who saw and heard the witnesses.

The plaintiffs here argue upon their assignments of error that the verdict is against the weight of the evidence and that the court erred in its rulings on the admission and rejection of evidence. As the judgment must be reversed and the cause remanded for another trial, we shall not express any opinion on the weight of the evidence. We may add that upon an examination

misrepresentation, failure of consideration, etc.

The state also had in the pleadings defense pleaded some of the issues, which was to the effect that prosecutrix and defendant had entered into an agreement that defendant should cease his association with X. D. Joyce in behalf of plaintiffs and the return of those letters, documents or papers, provided plaintiffs and defendant could secure the "left" or incriminating evidence from the Watkins' Publishing Company or prevent that company of the Potential Poetry that defendant was right or wrong.

Good has made remarks in that authorship, and upon consultation with the composition of that enterprise and as such of its very business, the defendant finding out are its plaintiffs that not those remained a further written agreement to the effect that Kim and Thomas agreed to pay all the right, title and interest of Parker in and to this stock. In other words, the provisions of the first part of the agreement were claimed to have been performed. The agreement cannot without be set up in the plea in bar relying on misrepresentation.

"This writing is such as to amount to a bargain in. Parker from any liability which may arise under the written instrument. Thomas agrees to pay the legal consideration in the written release. It is accurate with this, for purposes of liability unlimited between us."

The question upon the final conclusion is the jury evidence having in mind their respective positions and the problem of the jury was in fact of the instrument upon its issues of fact as a whole. That writing was then approved by the trial court, why you not found the statement.

The plaintiffs here argue upon their contention of error that the verdict is against the weight of the evidence and that the court erred in its ruling on the admission and rejection of evidence. As the instrument used "a proper and the means provided for another trial", we still not approve any opinion as the weight of the evidence. We may add that upon a consideration

of the record we do not find that there was reversible error in the court's rulings on the admission and rejection of the evidence submitted.

The controlling question of fact in the case was whether the delivery of the contract sued on was conditional upon its being used only for the purpose of effecting a sale of the stock in question to Mr. Boyce.

Defendant's testimony was to the effect that this second writing, purporting to release him from obligations of the first, was stolen from his files. The testimony for plaintiffs tended to show that it was never in fact executed. One or the other of the parties to the controversy was clearly not telling the truth. Under these circumstances it was necessary to a fair and impartial trial that the instructions of the court should be clear and free from error in the statement of the law applicable to the facts.

At the request of the plaintiffs the court instructed the jury that according to the terms of the contract the plaintiffs did not undertake or agree to convey the certificate of the 15,200 shares of the capital stock of the Workers' Publishing Society, but only undertook and agreed to sell and convey all the right, title and interest which the plaintiffs had in the said certificate. Further, that by the phrase "right, title and interest" was meant only such right, title and interest, if any, whether large or small, as the plaintiffs had at the time of the making of the contract. Further, that if the jury should find from all the evidence, and under the instructions of the court, that the plaintiffs were pledgees of the certificate of stock for 15,200 shares of the capital stock of the Workers' Publishing Society, then the jury was instructed that the plaintiffs had in law a special property in the

of the policy we is not that the jury was reasonable error in the court's rulings on the objections and rejection of the evidence admitted.

The contributing question of fact is for the jury the trial the history of the contract and on the evidence upon the issue and only for the purpose of affording a sale of the right to pass title to Mr. Bryce.

Defendant's two-story was in the street that this ground will, according to relief the true obligations of the first, was which was the title. The contract the plaintiff stated is also that it was error in that condition. And in the view of the testimony in the contracts, was clearly not telling the truth. Under these circumstances in the evidence is a fair and impartial trial the instructions of the court should be clear and free from error in the statement of the law applicable to the facts.

At the request of plaintiffs the court instructed the jury that evidence in the form of the contract the plaintiffs did not attempt to show or claim the authorities of the [illegible] change of the matter from of the [illegible] testimony, but only contradicts the [illegible] and money at the right, title and interest only the plaintiffs had in the real property. Further, that by the phrase "right, title and interest" was meant only such right, title and interest, if any, whether there is small, as the plaintiffs had at the time of the making of the contract. Further, that if the jury should find from all the evidence and under the instructions of the court, that the plaintiff were judgment of the contract of sale for it, for thereof of the land that which of the [illegible] [illegible], then the jury was instructed that the plaintiffs had in fact a mutual property in the

said certificate of stock which could be sold or conveyed to others with or without the consent of the pledgor.

At the request of the defendant the court told the jury that before it could find the issues for the plaintiffs, it must find from a preponderance of the evidence that the plaintiffs were ready, willing and able to carry out the contract; that if plaintiffs had failed in the proof of this essential requirement, the jury should find the issues for the defendant.

Again, the jury was instructed that in order for the plaintiffs to recover in the case they must prove by a preponderance of the evidence that they had a right, title and interest to the 15,200 shares of stock which they could sell, transfer and deliver to the purchaser, and unless the jury should find that the plaintiffs had a right, title and interest to the stock, it was the duty of the jury to find the issues for the defendant.

Further, that "a right is a well founded claim founded in or established by law," and unless the jury should find that the plaintiffs had proven that they had such a right to the stock in question, the jury should find the issues for the defendant.

The jury was further instructed:

> "Before you will be justified in finding a verdict for the plaintiffs you must be convinced by a preponderance of the evidence that the plaintiffs had some right, title and interest in and to the 15,200 shares of stock which the plaintiffs allege to have sold to the defendant, and the failure of plaintiffs to prove some interest in any one of the three, namely, that they, plaintiffs, had a right, title or interest in such stock, will make it your duty to find the issues for the defendant."

It will be noticed that these different instructions direct a verdict and that it was therefore necessary that each of such instructions should place before the jury all the things essential to such a verdict. We think, not to mention other defects, that all of these instructions given at defendant's request had a tendency to confuse the jury. The court properly instructed,

at the request of plaintiffs, as the written agreement showed, that plaintiffs had not undertaken or agreed to convey the certificate, but only their own right, title and interest in the same. We understand the uncontradicted evidence showed that plaintiffs and defendant jointly held the certificate for these shares of stock as pledgees of the same to secure them on account of advancements which had been made to the Workers' Publishing Society. This being the case, there could be no question that they had some right, title and interest which was capable of transfer. The instructions put this uncontradicted fact before the jury as one of the issues upon which the jury was required to pass. The stock stood in the name of one Larson, secretary of the Cook County Central Committee of the Socialist Party, and that committee appears to have had an option, the precise nature of which is not disclosed by the evidence, for the purchase of the same, but the certificate had been delivered to defendant, and the evidence showed that after the making of the contract it was delivered by defendant to the plaintiff Ehman. The evidence also showed that the parties to the contract held it as security for the money which they had advanced. There could therefore be no question that plaintiffs had a property right which was subject to be transferred to the defendant in case he wished to buy it. We think the instructions were well designed to confuse the jury.

The instruction last named was also erroneous in that it stated that before the jury would be justified in finding a verdict for the plaintiffs, it must be "convinced" by a preponderance of the evidence. A jury must <u>believe</u> before it may find a verdict. In some cases it may have been held that an instruction that the jury should be "satisfied" under particular facts was not erroneous, but we are not aware of any case in which it

at the request of plaintiffs, on the written agreement signed, that plaintiffs had not undertaken or agreed to convey the entireties, but only their own right, title and interest in the same. It materialized the circumstances which gave rise plaintiffs and defendant jointly held the certificate for three shares of stock as pledgees of the same to secure the loan in amount of advancements which had been made to the Trustees' building fund. This being the case, there would be no question that they had some right, title and interest which was capable of transfer. The instructions put this contentional fact before the jury as one of the issues upon which the jury was required to pass. The court stated to the jury of his interpretation of the Home Guaranty Mortgage Condition of the Complaint Party, and that therefore appears to have had no claim, the sum also stated of which is not disputed by the evidence, the defendants of the case, but the particulars had been delivered to defendant, and the evidence showed that after the making of the contract it was delivered by defendant to the plaintiff Brown. The evidence also showed that the parties to the contract held it as security for the money which they had advanced. There could therefore be no question that plaintiffs had a property right which was without is be transferred to the defendant in case he claimed to buy it. The claim the instructions were well designed to assist the jury.

The instruction last noted was also erroneous in that it stated that before the jury could be justified in finding a verdict for the plaintiffs, it must be "satisfied" by a preponderance of the evidence. A jury must _believe_ before it may find a verdict. In some cases it may have been held that in instructing the jury doubt be "satisfied" under circumstances that may be erroneous, but we know not cases of any case in which it

has been held that a jury must be "convinced" before finding a verdict. The word carries with it and is well intended to convey to the jury the idea that they must believe without doubt before finding a verdict for plaintiffs. This, of course, is not the law in civil cases.

Because of the errors in the giving of these instructions the judgment is reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McSurely, P. J., and Johnston, J., concur.

[illegible] has been held that a jury must be "conciliated" before finding a verdict. The very reviews with it and it well [illegible] to agreed to the jury, one into some trap-door [illegible] [illegible] before finding a verdict [illegible]. That, if [illegible] is not the law it will [illegible].

Because of the history in the writing of these [illegible] [illegible] the judgment of [illegible] [illegible] [illegible] [illegible].

Respectfully yours,

[illegible]

218 - 28053

(326a)

R. E. ABBOTT and T. C. IRWIN, Doing Business as ABBOTT-IRWIN COAL COMPANY, Appellees,	APPEAL FROM COUNTY COURT OF COOK COUNTY.
vs.	
O. H. HABSON, Appellant.	

230 I.A. 652

MR. JUSTICE HATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $962.77 entered on the verdict of a jury. The plaintiff sued for the balance due as alleged on account of coal sold and delivered. A statement of the account was attached to the declaration and a copy of the written contract sued on, whereby plaintiff agreed to sell and the defendant to buy 27 cars of Fifth and Sixth Vein Indiana Nine Run coal. The defendant filed a plea of the general issue, but there was no affidavit attached to it.

By virtue of the provisions of the statute (Cahill's Illinois Revised Statutes, sec. 52, page 2677) the defendant might not on the trial deny the execution of the contract sued on. This contract stated on its face that in order to bind the seller it must be signed by a member of the firm. It was not so signed by any member of the firm, but by an employee named Wolf. Defendant therefore says, relying on Wagnaman v. Bradkan, 52 Ill. 465, that the contract was not admissible in evidence for any purpose. The decision cited and relied on has, we think, no application to the facts in this case. In the first place, because the defendant was not in a position to raise the question under the pleadings by reason of the statute already cited, and further, because the uncontradicted evidence in the case shows that the parties to the contract acted upon it as if it had been signed. As was said

in Central Trust Co. v. John M. Smyth Mer. Co., 222 Ill. App. 347:

> "In Forthman v. Deters, 206 Ill. 159, the court said: 'It is well settled by the decisions of this and other courts that, where a party accepts and adopts a written contract even though it is not signed by him, he shall be deemed to have assented to its terms and conditions and to be bound by them.'"

It was claimed upon the trial that the coal delivered was not of the proper kind or quality, but that issue was submitted to the jury under instructions of which no complaint is made, and it is not argued that the verdict is against the weight of the evidence.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., concurs.

228 - 28063

PETER IMMORDINO,
Appellee,

vs.

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET & SOUTH CHICAGO RAILWAY COMPANY and THE SOUTHERN STREET RAILWAY COMPANY, Operating Under the Name and Style of CHICAGO SURFACE LINES,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

230 I A 552

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment in the sum of $2500 entered upon the verdict of a jury in an action on the case for personal injuries, motions for a new trial and in arrest of judgment having been overruled.

The declaration averred that on October 9, 1918, defendants were operating a railroad on Division street in the city of Chicago, and by their servants were propelling a car by means of electricity in an easterly direction; that plaintiff was riding in an automobile, and in the exercise of ordinary care for his own safety, when the defendants carelessly, negligently and wrongfully operated, drove, managed, equipped and propelled said street car so that it ran upon and against the plaintiff and the automobile in which he was riding, injuring him.

The defendants filed a plea of the general issue. The errors assigned and argued are that the evidence fails to establish negligence on the part of defendants; that plaintiff was guilty of contributory negligence; that the court erred in the giving and refusing of instructions.

We find it necessary to discuss only the alleged negligence of the defendants.

The controlling facts are, we think, clearly established by the evidence. The accident occurred on October 9, 1918, as alleged, at the intersection of Division and LaSalle streets in the city of Chicago. Division street is a public highway extending east and west; LaSalle street is a public highway extending north and south; one block west of LaSalle street, running parallel to it, is Wells street. Two tracks of the defendant company were laid in Division street; over the north track defendants ran their west bound cars, and over the south track their east bound cars. The car involved in the accident was one which first ran north on State street to Division street, then west on Division street to Wells street, where it made a cross-over to come back east on Division street to State street, then south on State street to the point of starting. The cross-over between Wells and LaSalle streets was a switch connecting east and west bound tracks. As the cars were operated at the time in question, there was a three minute lay-over at the west end of the run. The cross-over was about 45 feet long, its west end was 250 feet from Wells street, and the distance from the north rail of the north track to the north curb of Division street was about 12 feet. The gage of the street car track was 4 feet, 8½ inches. The distance from the west curb of LaSalle street to the west building line of the same was 21 feet, 3½ inches. There were no car tracks in LaSalle street.

The accident occurred a little to the west of the intersection of the two streets at about 4:20 p. m. The ground was dry and the day was clear. The plaintiff, at the time he received the injury, was riding in an automobile owned and driven by Dr. Joseph Farina, who had driven his machine for about three years. On this particular day Dr. Farina had attended a public reception given to Italian soldiers at the Auditorium. A request had been made that owners of automobiles should take these soldiers for a

The municipality forbade use, on sight, directly adjacent to the entrance. The position occupied by Lubomir S. 1924, as stated, on the intersection of Division and Vasilie streets in city at Antonyo. Division street is a quiet side-street extending east and west; Vasilie street is a busier thoroughfare north and south; one block east of Vasilie street, another parallel to it, is Felix street. The tracks of the Intrabend Railway line lie in Midtown tunnel; over the south track automobiles run their west bound route, and over the north track their east bound route. The car involved in the accident was one which Fleet was route on Vasile street to Division street, then east on Division street to Felix street, where it made a cross-over to open track on Division street to Vasile street, then south on Felix street to the point of starting. The intersection between Felix and Vasilie streets was a width considering and not very broad street. As the car were approaching at the time in question, there was a large square box-car on the west end of the run. The cross-over was about 25 feet long, the west end was the fact from Felix street, and the distance from the north rail of the north track to the north end of Division street was about 12 feet. The width of the street was about 6 feet, 22 inches. The distance from the west side of Vasilie street to the car building line is the car was 22 feet, 8 inches. There was no car track in Vasilie street.

The accident occurred a little to the west of the intersection of the two streets at about 6:00 p. m. The ground was dry and the day was clear. The plaintiff, at the time he received the injury, was riding in an automobile owned and driven by Dr. Frank Fulton, who had taken his patient for that long part. On this pretendant for Dr. Fulton had attended a party wrapping given to Italian soldiers of the neighborhood. A report had been made that crews of automobiles should have these soldiers for a

drive through the city, and in response to this request Dr. Farina took three soldiers into his machine at that place. These three soldiers, plaintiff and his brother, John Immordino, and a police officer named Schulz, were the occupants of the car. Dr. Farina had driven them to the North side of the city and was returning south on LaSalle street. Two drums, some bugles and streamers were carried in the automobile, which was a seven passenger Jeffery car. Dr. Farina testified that the machine was a lefthand drive; that he sat on the lefthand side on the front seat, the policeman at his right, the three soldiers in the back seat, and plaintiff and his brother in two small seats between the back and front seats. The automobile was driven south on LaSalle street on the west side of it, and the testimony shows that it stopped at the north side of Division street, desiring to go west on Division street. Dr. Farina describes his manner of doing so, and it is perfectly apparent from this, as well as all the other evidence given on behalf of both plaintiff and defendants, that the driver of the automobile was negligent and that his negligence had much to do with the happening of the accident. He was proceeding south on LaSalle street and on the righthand side of the street, and he should have turned into Division street either on the north side of the street or in the west bound track. Instead of doing this, he drove to the south, describing the arc of a circle, passing to the south of both tracks and then to the westward in and across the east bound or south track, which he was not able to clear in time to prevent a collision with an east bound street car which was approaching from the west in plain view. He, the driver, attempts to excuse his negligence in this respect by testimony to the effect that Division street, between the north curb and the west bound track, was blocked by other automobiles, and he says that there were two or three street cars standing upon the west bound track. His cross

examination, however, develops the fact that the nearest street car on the west bound track was at a distance of 50 feet west of La-Salle street; so it is apparent, even from his own testimony, that there was no excuse for his negligence in this respect. Indeed, we think that a preponderance of the evidence indicates that the north side of Division street was not blocked at this time in such a way as would prevent his safe passage.

It is true that the negligence of the driver cannot be imputed to the plaintiff, who was a stranger in the city, unfamiliar with our language and, it also appears, wholly inexperienced in driving an automobile. For this reason we are not disposed to hold that he was guilty of contributory negligence under all the circumstances, but the whole situation there is important as bearing on the question of whether the motorman of the street car was guilty of any negligence tending to bring about the injury.

Two of the witnesses state that the street car was more than 200 feet away at the time they first saw it coming toward the automobile, and at the moment when the automobile, in describing the arc of the circle upon which it moved, reached the rail of the east bound track. This is manifestly untrue, considering all the evidence, because if so, at the conceded speed at which the automobile was moving, it would have been clear of the track long before the street car reached the point of impact. It is apparent that the street car was not moving at any extraordinary rate of speed, because, according to Dr. Marina's testimony, it moved only ten or fifteen feet after the impact; while a preponderance of the evidence indicates that it moved a much less distance than that. This would have been impossible had it been moving at the rate of speed testified to by the plaintiff's witnesses. We think a preponderance of the evidence, which we have carefully examined, indicates that the street car was not more than 25 or 30 feet away at the time the automobile reached

4

manoeuvrability, however, despite the fact that the chauffeur should have
on the road Sunday was as a consequence of the fact that most of his
skill stems; so it is apparent, even from the two instances, that
there was no reason for his negligence in this respect. Indeed,
we think that a preponderance of the evidence indicates that the
main site of Mathias street was not blocked at this time in such
a way as would prevent the sun's passage.

It is upon this the negligence of the driver cannot be
imputed to the plaintiff, who was a stranger in the city, unfamiliar
with our language and, it also appears, totally inexperienced in
driving an automobile. For this reason we are not inclined to
hold that he was guilty of contributory negligence using all the
circumstances, but the cases examined from is inherent so
heavily on the question of whether the actions of the driver and
the duty of the negligence testing to study about the injury.

The of the witnesses state that the street car was
more than 200 feet away at the time they first saw it coming
toward the automobile, and at the moment when the automobile, in
descending the rate at the street car didn't it moved, reached the
rail of the car hence track. This is conflicting evidence, notwith-
standing all the witnesses, however it is, is the uncontested speed at
which the automobile was moving, it would have been clear of the
track long before the street car reached the point of impact. It
is apparent that the driver car was not moving at any substantially
rate of speed, however, according to Dr. Fuchs's testimony, it
moved only ten or fifteen feet after the impact; while a pre-
ponderance of the evidence indicates that it moved a much less
distance than that. Life might have been impossible had it been
moving at the rate of speed testified to by the plaintiff's
witnesses. To think a preponderance of the evidence, this we
have carefully searched, indicates that the street car was not
more than 80 or 90 feet away at the time the automobile reached

the east bound track; that the motorman had no reason to expect that the automobile would turn into the track in the way it did, and that the motorman was not guilty of any negligence tending to cause the accident.

We have seen that the condition of the north track and the space between it and the curb was not such as to make it necessary for the driver of the automobile to proceed westward in the south track, and it follows that the motorman had no reason to anticipate or expect that the automobile would be in that track. In other words, the motorman, as has been many times held in such cases, was not bound to anticipate negligence on the part of the driver of the automobile.

The testimony of witnesses as to distance, time, etc., and their estimates in these respects amount to very little as against the uncontradicted physical facts, which show that the street car was brought to a standstill almost at the moment of the impact. One of the witnesses for plaintiff described the accident as "immediately simultaneous with his approaching the corner." This witness, we think it is fairly inferable from all the evidence, described the situation with considerable accuracy.

The injury to the plaintiff is, of course, to be regretted; but the party responsible for it was his friend, who was driving the automobile in which he was riding, and not the motorman of the defendant company. Holding the railroad companies responsible for this accident would necessitate laying down rules which would make the practical operation of their road impossible.

The judgment is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

McSurely, P. J., and Johnston, J., concur.

the most round argument; that the motorman had no reason to suspect that the automobile would turn into the tracks in the way it did, and that the motorman was not guilty of any negligence leading to cause the accident.

So here then lies the decision of the court (and that seems to be the only one that can not be in error) it seems that the driver of the automobile is guilty of negligence in the most first, and it follows that the motorman had no reason to anticipate or assume that the automobile would do the that itself. In other words, the motorman, as he was then driving, had in such case, the right to anticipate negligence on the part of the driver of the automobile.

The doctrine of "chances" in the license, time, etc., and their relative in these records seems to very little as regards the unmodified physical facts, that such that the street car was brought to a standstill almost at the moment of the impact. One of the "chances" for plaintiff mentions the motorman as "immediately alongside with the approaching car woman." This witness, we think it is fairly inferable from all the evidence, described the situation with substantial accuracy.

The injury to the plaintiff is, of course, to be regretted; but the party responsible, for it was his friend, was driving the automobile in which he was riding, and not the motorman of the defendant company. Holding the railroad responsible for the life accident would necessitate laying down rules which would make the practical operation of street road impossible.

The judgment is reversed with a finding of law.

DECISION FOR PLAINTIFF.

Babcock, J. P., and Jenkins, J., concur.

228 - 28063

FINDING OF FACT.

We find that the defendants were not guilty of any negligence tending to cause the injuries for which plaintiff in this action sues.

234 - 28069

(04082)

MORRIS M. GOLLIN,
Appellee,

vs.

MATTESON & CONRAN,
a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

200 I.A. 352

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $10.00 entered on the finding of the court.

The statement of claim alleged that on May 16, 1922, the defendant entered into a contract by which he agreed to rent to plaintiff a suite of rooms; that the contract was made through the wife of the defendant, who made a deposit of ten dollars with the defendant in connection with the contract; that the contract was to become effective after an investigation of plaintiff's references; that prior to such investigation plaintiff rescinded the contract.

The record does not show that there was any affidavit of merits filed. The defendant was not represented by counsel in the trial court, and the plaintiff has not appeared in this court in favor of the judgment.

The evidence for plaintiff tended to show that he told his wife to rent a flat from defendant at the price of $65 per month; that she visited the office of defendant and signed an application for a flat at the price of $70 per month; that the defendant's clerk asked for a deposit of ten dollars, which was made; that Mrs. Gollin told her husband in the evening what she had done, and on the following day he notified the defendant that he would not take the flat and demanded the return of the ten dollars.

The record does not show that any evidence was offered in behalf of the defendant, but the following transpired at the trial:

"MR. HOLLY (attorney for plaintiff): To be of some assistance to the court, I would suggest that Mr. Conran return to Mr. Gellin the ten dollar deposit and we will pay our own costs, so Mr. Conran will have no loss.

MR. CONRAN: We are members of the Real Estate Board and it is against the rules to refund deposit money. If the court gives judgment against us, it will set a bad precedent.

THE COURT to Mr. Holly: Would you be willing to take a nonsuit, so there would be no decision?

MR. HOLLY: I sure will.

MR. CONRAN: I am perfectly willing to return the ten dollars deposit if the court will render judgment for us.

MR. HOLLY: Your Honor, this man Conran imposed on the court. He said he would pay, but is walking out of the court room not paying, as agreed.

The court looks up. THE COURT: Well, if that's the kind of a man he is, enter judgment for plaintiff."

We think the evidence for the plaintiff tended to establish a prima facie case in his favor. Defendant made no motion for a finding in his own behalf and apparently left the court room while the trial was in progress.

The judgment is affirmed.

AFFIRMED.

McSurely, P. J., concurs.

252 - 28087

TEMPLETON LIME COMPANY, a corporation, Appellant,	APPEAL FROM
vs.	MUNICIPAL COURT
J. GARRETT FITZGERALD, (Defendant),	OF CHICAGO.
MADISON & KEDZIE STATE BANK, a corporation, Appellee.	

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Templeton Lime Company, a corporation, which was the plaintiff in the trial court, from a judgment entered in favor of Mazie A. Fitzgerald and against the garnisher. Upon issues as made up on the interpleader of Mazie A. Fitzgerald, the matter was heard by the court without a jury and judgment for costs was entered against the garnisher plaintiff upon a finding of the court.

The record tends to show that appellant recovered a judgment on February 8, 1922, against J. Garrett Fitzgerald for the sum of $1,449.33 and costs; that execution therefor issued thereon and was returned no part satisfied; whereupon the Templeton Lime Company filed an affidavit for garnishee summons upon the judgment. The summons issued and was served upon the Madison & Kedzie State Bank as garnishee on February 10, 1922.

On February 17th thereafter the garnishee answered "that one Mazie Fitzgerald has and maintains with the garnishee a commercial checking account; that one J. Garrett Fitzgerald has authority to issue checks against said account as the agent of the said Mazie Fitzgerald; that it has been informed

and so believes that the said J. Garrett Fitzgerald has no interest or property right in said account." This answer was contested by the plaintiff garnisher, whereupon on March 18, 1922, Mazie A. Fitzgerald by leave of court filed her interpleader, by which she alleged that the moneys on deposit with the Madison & Kadzie State Bank were moneys derived from the sale of real estate belonging to her.

The Templeton Lime Company traversed this interplea and denied that the money so on deposit was the money and property of Mazie A. Fitzgerald, and denied that it was derived from the sale of her real estate, and asserted that if the same, or any part thereof was derived from the sale of said real estate, nevertheless the said real estate belonged to the said J. Garrett Fitzgerald at the time, and the title thereto was vested in Mazie A. Fitzgerald without consideration as against the Templeton Lime Company, and that at the time of placing the title to said real estate in the said Mazie A. Fitzgerald, the indebtedness of J. Garrett Fitzgerald to the Templeton Lime Company existed and that said vesting of title in Mazie A. Fitzgerald was fraudulent and void as against the Templeton Lime Company. The traverse further averred that the said Mazie A. Fitzgerald had deposited the said funds in the bank, subject to the order and check of J. Garrett Fitzgerald and authorized and permitted him to withdraw the same on his individual check and at his pleasure, and had permitted him to obtain credit upon the fact of such deposit and to exercise authority and ownership thereof, and that thereby the interpleader is estopped as against the plaintiff to deny that the deposit belonged to J. Garrett Fitzgerald, and further, that if any part of said deposit was the property of said Mazie A. Fitzgerald, nevertheless she permitted the same to be intermingled with the money and funds of the said J. Garrett Fitzgerald

and included in said deposit so that as to the Templeton Lime Company the moneys on deposit were the funds of the said J. Garrett Fitzgerald and subject to garnishment.

Evidence was introduced for and against the contentions of the respective parties and at the conclusion thereof the court made the finding upon which the judgment was entered.

The judgment debtor, J. Garrett Fitzgerald, is the husband of Mazie A. Fitzgerald and the evidence introduced tended to show that property belonging to him had been transferred in such a way as to place the title in his wife and the property beyond the reach of his creditors. The appellant proceeds upon the theory that a garnishment proceeding, although brought on the law side of the court and is a statutory one, is, nevertheless, equitable in its nature and that rules of an equitable nature must control in arriving at a conclusion upon the evidence, and in this connection cites Kiley for use v. Morrison, 180 Ill. App. 711, and other decisions which, it is claimed, sustain this contention.

While it is true that by virtue of the provisions of section 24 of the Statute, a law court in a case of garnishment is granted certain equitable powers which may be exercised by it under stated conditions, the proceeding is nevertheless on the law side of the court and in the first instance is essentially a proceeding at law and not in equity. Section 24 provides in substance that when it shall appear that any garnishee has in his, or under his control, any goods, chattels, choses in action or effects, belonging to or which he is bound to deliver to the defendant, with or without condition, the court or justice of the peace may make any and all proper orders in regard to the delivery thereof to the proper officer, and the sale or disposition of the same, and the discharging of any lien thereon, and may authorize [illegible] such property, or collect any choses

and insofar as such impact on that as to the Vancouver law
Company the manner on because were the funds of the city E.
Everett Kingsmill was subject to garnishment.

Defendant was interpleaded for and accepted the assignment
of the respective rights and of the obligation thereof the money
made the finding upon which the judgment was entered.

The judgment debtor, E. Everett Kingsmill, is the husband
of Amelia L. Kingsmill and the defendant intervener insists on
that property belonging to him has been improperly and
a way as to place the title in his wife and the property beyond
the reach of his creditors. The appellant presents upon the
theory that a garnishment proceeding, although brought on the law
side of the court and is a statutory one, is, nevertheless,
equitable in its nature and that upon of an equitable nature
must exercise in trying it a discretion upon its evidence, and in
this consideration cites Gay for use v. Gaylord, 1 Ill. App. 711,
and other decisions which, it is claimed, sustain this contention.

Since it is upon that ground of the provisions of
section 14 of the "Act", a lien exists in a case of garnishment
in general civil equitable proceeding which may be sustained by
it under stated conditions, the pre-existing in activity like on
the law side of the court and in the first instance is an actually
a proceeding at law and not in equity. Section 14 provides in
substance that when it shall appear that any garnishee has in
his, or under his control, any goods, credits, shares in notes
or effects, belonging to or which he is bound to deliver to the
defendant, with or without condition, the court or justice of the
peace may make any and all proper orders in regard to the delivery
thereof to the proper officer, and the sale or disposition of the
same, and the discharge of any lien thereon, and for enforcing
[illegible] or making any

in action, and account for the proceeds thereof; or, if the proceeding be in a court of record, the court may appoint a receiver to take possession and sell, collect or otherwise dispose of the same, and make all orders in regard thereto which may be necessary or equitable between the parties. This comes far short of granting to a court of law in a garnishment case general chancery powers; but, as we understand the section, simply means that after it has been legally determined that the garnishee has in his possession property belonging to the judgment debtor, that is, property which the judgment debtor would have a right to demand and receive from him, the court may then proceed to make distribution of that property to the parties entitled thereto, according to equitable principles.

The distinction is clearly pointed out in the case of Webster v. Steels, 75 Ill. 544. It is there held that in the Garnishment Act under the statute, the choses in action or credits in the hands of the garnishee belonging to the debtor must be of a legal and not an equitable character in order that the garnisher may be entitled to recover. This court has held to the same effect in London Guarantee & Accident Co. v. Meyerson, 108 Ill. App. 440. This distinction should be kept in mind in considering decisions such as LaSalle Opera House Co. v. LaSalle Amusement Co., 209 Ill. 104, which construes section 34 of the Garnishment Act.

The evidence in this case showed without dispute that although the account at the bank stood in the name of Mazie A. Fitzgerald, J. Garrett Fitzgerald was empowered to draw from that account by checks in his own name. What the effect of this evidence might be in a court with general chancery powers, we do not need to consider, but this court in a similar case, where proceedings were brought under the Garnishment Statute, has specifically held that

the garnisher might not recover. Aiad v. Aiad, 172 Ill. App. 163.

For the reasons indicated the judgment of the trial court is affirmed.

AFFIRMED.

McSurely, P. J., concurs.

264 - 28099

ELIZA TABER and CHARLES CARRINGTON, Appellees, vs. SAMUEL R. WITTELLE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $275 entered upon the verdict of a jury.

The statement of claim alleged that on December 4, 1920, plaintiffs owned an automobile and were driving it over and along Grand Boulevard near East Thirty-seventh street, in the exercise of all due care, when the defendant, driving another automobile at an excessive speed in the same boulevard and on the wrong side of the street, in violation of the statute and of the ordinance of the Board of South Park Commissioners, ran into the automobile of plaintiffs and then and there damaged it.

The affidavit of merits denied the negligence as alleged and set up that plaintiffs were themselves guilty of the negligence which resulted in the collision.

A reversal is urged here on two grounds.

First, it is said that the verdict is against the manifest weight of the evidence. It is true, as appellant urges, that the number of witnesses testifying in favor of defendant was greater than the number who testified for the plaintiff; but, as has many times been said, "evidence is to be weighed and not counted." We have examined this evidence and do not find anything that would justify us in setting aside the verdict of the jury, which has been approved by the trial judge. Indeed, the defendant does not deny some of the evidence tending to establish

an admission of negligence on his part.

It is next urged (and this seems to be the principal contention of the appellant) that the court erred in its ruling admitting evidence which incidentally tended to show that the defendant was protected by a liability insurance. The plaintiff Carrington testified that after the collision defendant gave him a card with his name on it. "Q. What else did he say to you? A. He said that 'My car was insured and my insurance company will take care of that.'

"MR. KINER: If the court please, I object to that.

MR. GEORGE: Did he give you the name of the insurance company? A Yes, sir.

MR. KINER: I object to that insurance proposition and move that it be stricken out.

MR. GEORGE: This is a conversation.

THE COURT: A conversation with the defendant?

MR. GEORGE: Yes, your Honor.

THE COURT: Objection overruled.

MR. KINER: Exception."

Again upon re-direct examination the witness said that he had another talk with defendant in his office a day or two afterwards, when the following occurred:

"Q. What did he say to you then about the accident?

A. He told me that he had consulted an insurance company and he was making out a final report.

MR. KINER: Your Honor, I object to that.

MR. GEORGE: Leave that out, about the insurance company.

THE COURT: I want to strike that out, the testimony of this witness so far as it refers to a conversation with reference to an insurance company is stricken. The objection is sustained.

MR. GEORGE: Yes.

THE COURT: The jury are instructed to disregard the testimony."

[illegible] of the examination of this witness

an abdication of responsibility on his part.

It is most unfair ; and this issue is in the political machination of the opposition that it is only which is the ruling administration without which institutionally lacked in some form the defendant was provided by a facility instrument. The circuit Prosecutor testified that when the solicitor questioned just the a month this his case as is. "Q. Then what did it not to just a. He said that "Q. Do you intend all to Bloomfield company will take back at jail."

"Q. Judge: If the money pleases, I ought to that.

Mr. Smith: Did he give you the book at the Internal Revenue? A. Yes, sir.

Mr. Blunt: I going to ask Internal Revenue permission not move that it be stricken out.

Mr. Crown: This is a conspiracy.

Mr. Wright: A conspiracy with the Attorney?

Mr. Smith: Yes, your Honor.

The Court: Objection overruled.

Mr. Crown: Exception.

Right then and without consulting the jurors his Honor said that as that matter left his determination, it was either a day or two adjournment, that the February session.

"Q. What did he say to you then about the payment?

A. He said he did so that matter mentioned on Internal Revenue Service? Did he ever making out a final report.

Mr. Crown: Your Honor, I object to this.

Mr. Brown: Leave that for, that is irrelevant evidence.

The Court: I want to notice that and, the knowledge of this witness or for as it refers to a transaction of a new system is an important evidence is material. The objection then is overruled.

Mr. Smith: Yes.

The Court: The jury all intended to indemnify the Internal Revenue."

the defendant made a motion to withdraw a juror, which was denied by the court and exception noted.

Appellant says, "That this is reversible error goes without saying," and a large number of cases are cited, but not discussed, which, presumably, it is thought sustain this statement. We think the cases do not so hold. That it may be reversible error, either in the preliminary examination of jurors or during the course of the trial, to endeavor to create prejudice by any means tending to bring information before the jury that the defendant is insured against liability on the cause of action, is undoubtedly true, but we are not aware of any case which holds that pertinent and material evidence should be excluded because it might incidentally thereby be made to appear that the defendant carried insurance. The amount of the verdictin this case does not indicate any passion or prejudice. The information was not placed before the jury in any manner which would tend to indicate that it was being injected by counsel for the purpose of creating prejudice, but on the contrary in response to a question as to what was said in a conversation between one of plaintiffs and the defendant at the time of or right after the accident. Moreover, the record shows that the court struck out the testimony of the witness insofar as it referred to any conversation with reference to an insurance company and orally instructed the jury to disregard the testimony.

The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., concurs.

273 - 28108

HYMAN BLOOMBERG,
Appellee,

vs.

ERIE FURNITURE CO., a Corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for possession entered on the finding of the court in an action of forcible detainer.

The defendant filed a special and limited appearance and moved the court to quash the summons, which was dated May 2, 1922, returnable May 9, 1922, and served May 3, 1922. The appellant argues that it was error to deny this motion. The court did not err in this respect. See Sections 40, 42 and 48 of the Municipal Court act as amended by act approved May 18, 1917, adopted November 6, 1917. (Session Laws 1917, p. 329.) Even if the summons or service had been defective, the defendant waived such defect by taking part in the hearing upon the merits. Szulerecki v. Oppenheimer, 218 Ill. App. 508.

It is next urged that proof was insufficient in that the plaintiff failed to introduce evidence tending to show that the defendant was in possession of the premises when the suit was started. We have examined the evidence and think it was sufficient.

The judgment is therefore affirmed.

AFFIRMED.

McSurely, P. J., concurs.

28118

283 - 28118

(32121)

MILLER FRUIT COMPANY,
a Corporation,
Appellee,

vs.

DAVID KELLERMAN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

Certificate of Judgment

76

283 I.A. 553

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The questions of law and the facts as they appear in this record are similar to the facts and law as the same appear in the record in case general number 28117, which is an appeal case between the same parties. In an opinion this day filed in case No. 28117, we have discussed the questions involved, and for the reasons stated in that opinion, here as there, the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., concurs.

292 - 28127

ANTONINA SITKO,
Appellee,

vs.

JOZEF SASIADEK and
KAROLINA SASIADEK,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants below from a judgment in the sum of $600 entered upon the finding of the court. Two points are urged for reversal. First, that the proof fails to show a joint liability; and, second, that the finding and judgment of the court are against the greater weight of the evidence.

The statement of claim alleges that commencing in the fall of the year 1915 and continuing until the month of March, 1920, plaintiff at the special instance and request of the defendants, gave to them small sums of money to keep for her, which they promised and agreed to return upon her request; that these amounted to the total sum of $700, which she has requested the defendants to return to her, but that they have returned only $100, and have failed and refused to return the balance.

The statement of claim also sets up an alleged stated account. Defendants by their affidavit of merits deny that plaintiff gave to them, or either of them, any sums of money in excess of the sum of $100, and aver that this sum was returned by the defendant Karolina to the plaintiff, and deny that they or either of them promised or agreed to repay to the plaintiff any other sum or sums.

The evidence tended to establish the following

facts. The plaintiff is the sister of the defendant Karolina Sasiadek, and the defendant Josef Sasiadek is the husband of said Karolina. The plaintiff lived in Poland and her sister Karolina sent to her there the sum of $200 with which to pay the expenses of plaintiff's migration to America. This was in October, 1913. After plaintiff's arrival in this country she lived in the home of her sister, the defendant, and continued to reside there for about seven years. She left the sister's home in 1920, and on September 25, 1920, thereafter was married. During the time she lived with the defendants plaintiff worked in a restaurant and received a compensation of from $10 to $15 a week. It is conceded that she repaid to her sister the money which had been advanced to bring her to America, and it is admitted by the sister and her husband, defendants, that she had deposited with her sister the sum of $100, which was repaid prior to the beginning of this suit.

The plaintiff testifies to continuous transactions in which she made deposits of her money with the defendants, or one of them, and she says: "He had a book and he wrote in the book every cent, every cent that I gave him, and it was figured up, it was seven hundred dollars." Again she says: "Well, they both took it; they were together. Sometimes she would take it and sometimes he would take it." It seems that Mrs. Sasiadek had entire charge of the financial affairs of the family in behalf of both her husband and herself, so that if the deposits were in fact made, we do not think there would be any question about the joint liability of the husband and wife under the circumstances.

The defendants positively deny the receipt by them, or either of them, of any sum of money other than the $100 which was returned, so that in its last analysis the case turns upon

the question of fact as to whether this plaintiff did deposit her earnings with the defendants from time to time. The evidence bearing on this issue is conflicting and an analysis of it is made very difficult by the fact that the witnesses were not familiar with the English language. As to some of them, it was necessary that they should testify through an interpreter. The law suit seems to have been the result of a family quarrel, in which there was intense bitterness. It seems that shortly after the marriage of the plaintiff she became the mother of a child, and she accused her brother-in-law, the defendant, of being the father of it. She started bastardy proceedings against him, but the result of that proceeding is not disclosed in the record. At another time she had him arrested on a charge of larceny, the specific offense alleged being that he had stolen $600 from her.

We have in the record the positive testimony of the plaintiff with the equally positive evidence of the defendants, and if it were simply the word of one against the other, we should be constrained to hold that the plaintiff failed to establish her case by a preponderance of the evidence. But her case does not stand on her own testimony alone. Antoni Kicpa, who it appears is the landlord of the defendants, testifies that the defendant Jozef Sasiadek said to him, "I wrote down all this money in a book, in my book;" that he knows how much she has got "because I put it all in the book." It does not appear that this witness was related to the plaintiff; on the contrary, it does appear that he was a good friend of the defendant Jozef. In all, plaintiff seems to be corroborated by four other witnesses, who testified to conversations of the parties tending to sustain the allegations of the plaintiff. Some of these were relatives of

the plaintiff by marriage and evidently testified with feeling. If their evidence stood alone, we should not be inclined to give much weight to it, but we may not altogther disregard it.

The story of the plaintiff is not unreasonable. It is not denied that for many years she was working for a salary out of which, considering her mode of living, she would have considerable savings, and it is not improbable to suppose that as a stranger in a new country she would naturally turn to her sister and brother-in-law as the persons with whom she would leave her savings.

The trial court had the opportunity, which we do not have, of seeing the witnesses and hearing them testify. We think we should not interfere with the judgment and it is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

302 - 28137

WORUMBO COMPANY, a Corporation,
Appellee,

vs.

A. WEIRSTEIN,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $4763.60 entered upon the verdict of a jury, motions for a new trial and in arrest of judgment having been overruled by the court.

The cause was tried on the plaintiff's second amended statement of claim, filed May 15, 1922. This statement avers that the plaintiff is a corporation of the State of New York with its principal office and place of business in New York City, New York; that it is and has been in the business of selling all-wool fabrics in piece goods and overcoatings, manufactured by its own mills situated and located in Lisbon Falls, Maine; that on or about March 6, 1920, the defendant ordered of the plaintiff, and agreed to purchase and accept from the plaintiff during the months of June, July and August, 1920, free on board New York or Lisbon Falls, Maine, and the plaintiff agreed to have manufactured by its mills and to sell and deliver to the defendant, free on board New York or Lisbon Falls, Maine, during said months, certain piece goods or overcoatings as set forth in an acceptance of the order bearing date March 31, 1920, and delivered to the defendant by plaintiff, and received by defendant on or about April 1, 1920. The order is set out in haec verba and provides that it contains the entire contract, and that it may not be modified, added to or changed except in writing signed by the seller. It also describes in detail the quantity,

Box - 3811?

[illegible] COURT, a
Corporation,

Appellee,

vs.

A. [illegible],

Appellant.

[illegible] SUPREME COURT
of [illegible].

[illegible]

[illegible]. Contract; warranty; [illegible] of [illegible].

This is an appeal by the defendant from a judgment in the sum of $4700.00 entered upon the verdict of a jury, welcome The s was tried and in answer to judgment having been entered by the court.

The cause was tried on the plaintiff's amended complaint filed May 15, 1970. This alleged among that the plaintiff is a corporation of the State of New York in principal office and place of business in New York City, New York; that it is and has been in the business of selling all-wool fabrics in piece goods and remnants, manufactured by its own mills situated and located in Eight Mile, Ireland; that on or about June 4, 1969, the defendant ordered of the plaintiff, and agreed to purchase and receive from the plaintiff during the months of June, July and August, 1970, from on hand for full or [illegible] Fabric, Color, and the plaintiff agreed to have manufactured by its mills and to sell and deliver to the defendant, from on hand for Tops or [illegible] Fabric, Price, Darkly [illegible], certain piece goods or remnants, kept on hand from in on experience of the order ending the [illegible] 31, 1970, and delivered to the defendant by plaintiff, and received by defendant on or about April 1, 1970. The order is set out in full verbatim and provides that it constitute the entire contract, and that it may not be modified, added to or changed except in writing signed by the seller. It also describes in detail the quantity,

style, color, width, weight, description and price of the various pieces of goods.

The statement of claim sets up a second order, purporting to have been given on March 24, 1920, upon similar terms and conditions and with like description of quantity, style, color, etc.

The statement further avers that immediately after the execution of these orders plaintiff proceeded to manufacture the same, and while they were being manufactured by plaintiff's mills, and on or after May 13, 1920, there ensued a series of correspondence between plaintiff and defendant, in which defendant attempted to and did repudiate and countermand the defendant's orders, and notified the plaintiff of his refusal to take the goods. The correspondence, which consisted of letters from an attorney of the plaintiff (whose authority is averred and not denied) together with certain letters from the defendant himself, is set up at length in the statement of claim.

To this statement of claim the defendant filed an affidavit of merits, which on motion of plaintiff by order entered June 14, 1922, was stricken from the files, and a motion of defendant for leave to file an amended affidavit of merits was denied. Thereupon the default of defendant for want of an answer was entered and a jury called for the purpose of assessing the plaintiff's damages.

The defendant has assigned and argued several alleged errors as to the proceeding for the assessment of damages. He says that the court erred in that proceeding as to the rule of law applied. The court told the jury that the measure of damages "is the estimated loss directly and naturally resulting to the plaintiff in the ordinary course of events from a breach of contract by the defendant." This is substantially the language of

style, motor, size, weight, inventories and value of the various classes of cars.

The statistics of claim data as a source value, particularly to have been taken on March 31, 1957, upon certain terms and conditions and with like description of quantity, style, motor, etc.

The statement further makes that knowledge after the execution of these alleged similarity criteria in specifications the most, and while they were being constructed by Chrysler Corp., and on or after Jan 31, 1957, they became a matter of [illegible] between plaintiff and defendant, in that defendant and affiliated to not all applicable and constituted the defendant's orders, and notified the plaintiff of its actions on sale and goods. The correspondence, which consisted of letters from an agent of the plaintiff (whose authority is general and not limited) together with certain letters from the defendant himself, is set out in full in the statement of claim.

In this statement of claim the defendant filed an affidavit of service, which on motion of plaintiff by order entered June 14, 1958, was stricken from the file, and a motion of defendant for leave to file an amended affidavit of service was denied. Thereupon the Judge of Exchequer for that at an earlier date entered and a judgment dismissing the plaintiff's action.

The statutes and regulations material to the proceeding for the assessment of damages. It appears that the court erred in that proceeding as in the rule of law applied. The court held that the measure of damages "is the unlimited loss directly and immediately resulting to the plaintiff in the ordinary course of events from the breach by the defendant." This is contradictory the language of

paragraph 2 of section 64 of the Uniform Sales Act (Cahill's Revised Statutes 1921, page 3048.)

The court further instructed that if the jury found from the greater weight of the evidence that there was no market for the merchandise contracted for at the time and place specified in the contract for the delivery of the same, then the measure of damages was the difference between what it would cost the plaintiff for labor and materials to make and deliver the merchandise according to the terms of the contract, and the price which the defendant, by his contract, agreed to pay therefor. The defendant says this is not the correct rule and that the jury should have been told that the true measure of damages was the difference between the contract price of the goods and the market price thereof at the time and place of delivery. However, there was competent evidence in the record tending to show, we think, that at the time of the breach there was no market price at the place of delivery for the goods purchased under the terms of the contract. If the jury found this to be a fact from the evidence, then the court properly stated the rule to be applied. See Uniform Sales Act, paragraph 4, supra.

In Central Trust Co. v. Smyth Mer. Co., 222 Ill. App. 347, this court said:

> "Where a party has contracted with another to manufacture certain articles, and the other repudiates the contract and refuses to accept the articles, and suit is brought against the latter for the breach, the damages recoverable are necessarily considered to be the amount that might have been realized had the contract been carried to completion. If the articles so refused had been manufactured and have a market value, the damages will be the difference between the contract price and the fair market value at the time of the breach, provided the latter is less than the former. Penn Plate Glass Co. v. James H. Rice Co., 216 Ill. 587; but if they have no market value, the damages will be the contract price. Bookwalter v. Clark, 10 Fed. 793. But if the articles so refused have not been manufactured, the damages will be the contract price less the cost of manufacture. Kingman & Co. v. Kanne Saxon Co., 176 Ill. 545."

See also Kingman v. Western Mfg. Co., 92 Fed. 486.

paragraph 2 of section 24 of the Uniform Sales Act [Ibid.]'s Revised Statutes 1970, sec 2408.]

The more further instructed that if the jury found from the greater weight of the evidence that there was no market for the merchandise contracted for at the time and place specified in the contract for the delivery of the same, then the measure of damages was the difference between what it would cost the plaintiff for labor and materials to make and deliver the merchandise according to the terms of the contract, and the price which the defendant, by his contract, agreed to pay therefor. The defendant says this is not the correct rule and that the jury should have been told that the true measure of damages was the difference between the contract price of the goods and the market price thereof at the time and place of delivery. However, there was uncontroverted evidence in the record tending to show, we think, that at the time of the breach there was no market price at the place of delivery for the goods manufactured under the terms of the contract. If the jury found this to be a fact then the plaintiff, (as the court properly stated) the rule to be applied. See Uniform Sales Act, paragraph 4, supra.

In Rockwell Steel Co. v. Smith Mfg. Co., 22 Ill. App. 547, this court said:

"Where a party has contracted with another to manufacture certain articles, and the other repudiates the contract and refuses to accept the articles, and suit is brought against the latter for the breach, the damages ordinarily are measurably ascertained to be the amount that might have been realized had the articles been carried to completion. If the articles or product had been manufactured and have a market value, the damages will be the difference between the contract price and the fair market value at the time of the breach, provided the latter is less than the former. Cohen Clothing Co. v. Cohen & Co., 24 Ill. App. 597; Ewer v. Ewer, 12 Ill. App. 292. But if the articles or product have no market value, the damages will be the contract price, less the cost of manufacture. Lawrence & Co. v. Tucker Co., 111 Ill. 848."

See also Clayton v. Tarrant Mfg. Co., 29 Ind. 488.

Defendant also contends that the court erred in overruling objections made by the defendant to the testimony of several witnesses given by depositions. There was, however, no motion to suppress these depositions, and the only objections which the defendant could rightfully urge upon the hearing were such objections as went to the competency of the witnesses, where they were disqualified and such disqualification could not be removed, or that the questions were immaterial or irrelevant. I. C. R. R. vs. Rosario Fumbimuo, 227 Ill. 170; Alters Commission Co. v. Gessel, 193 Ill. 153. See also Thompson v. Ancient Order of Gleaners, 200 Ill. App. 300; Fifth Avenue Society v. Gavenaugh, 186 Ill. app. 123; Hutchinson v. Bambas, 249 Ill. 624; Smith v. Swisart, 149 Ill. App. 31, and Delta Bag Co. v. Leyland & Co., 173 Ill. App. 38.

We do not think that the court erred in its rulings on the evidence. Moreover, we think it very doubtful whether the supposed errors argued with reference to the assessment of damages have been preserved for review on this record, the defendant not having made any motion to set aside the assessment, which would seem to be the proper practice in case it was desired to preserve these questions. Phoenix Ins. Co. v. Hedrick, 178 Ill. [illegible]. It is true, the record shows that a motion for a new trial was made by the defendant and overruled; but assuming, which we do not decide, that such a motion might perform the office of a motion to set aside the assessment, an examination of the record shows that the defendant has not assigned any error on the record upon the denial of its motion for a new trial. We hold that there was no reversible error in the assessment of damages.

It remains, then, to consider whether there was error in striking the affidavit of merits. The rules of the Municipal court have been made a part of the record. Rule 15 provides that every allegation of fact in any pleading, except allegation of

Defendant also contends that the court erred in overruling objections made by the defendant to the testimony of several witnesses given by deposition. There was, however, no motion to suppress these depositions, and the only objections with the defendant could rightfully urge upon the hearing were such objections as went to the competency of the witnesses, which they did establish and such disqualification could not be proved, in that the questions were immaterial in themselves. [illegible] v. Joseph Chamberlain, 147 Ill. 198; Illinois Central R. R. Co. v. Cheek, 168 Ill. 232. See also Thornton v. Central Trust Co. of Illinois, 90 Ill. App. 463; Little Rock Traction Co. v. Lindsay, 188 Ill. App. 139; Burnham v. Dodge, 90 Ill. 494; Smith v. Delaney, 148 Ill. App. 71, and Chicago City Ry. v. Bradford & Co., 175 Ill. App. 28.

We do not think that the court erred in its rulings on the evidence. Moreover, we think it very doubtful whether the suppressed sworn argument with reference to the assessment of damages have been preserved for review on this record, the defendant not having made any motion to set aside the verdict, which would seem to be the proper practice in order to be entitled to preserve some question. Chicago City R. R. v. Carroll, 148 Ill. 81. It is true, the record shows that a motion for a new trial was made by the defendant and overruled, but however, this we do not decide, that such a motion might perform the office of a motion to set aside the verdict, on consideration of the record shows that the defendant has not sustained any error on the ground upon the denial of its motion for a new trial. We hold that there was no prejudicial error in the assessment of damages.

It remains, then, to decide whether the court erred in sustaining the sufficiency of pleadings. The rules of the municipal court have been made a part of the record. Rule 21 provides that every allegation of fact in any declaration, counter declaration or

unliquidated damages, if not denied specifically or by necessary implication in the pleading of the opposite party, shall be taken to be admitted; that express admissions and denials must be direct and specific, not argumentative; that it shall not be sufficient to deny generally the grounds for relief alleged in the statement of claim, set off or counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth; that in first and fourth class cases for the recovery of money only, the defendant shall, if he makes a defense, file an answer, which shall be an affidavit sworn to by himself, his agent, or attorney, stating that he has knowledge of the facts and that he verily believes that the defendant has a good defense to said suit upon the merits to the whole or a portion of the plaintiff's demand; that such affidavit shall contain a concise statement of the ultimate facts constituting the defense. The stricken affidavit of merits purported to set up two supposed defenses. It was not subscribed and sworn to by the defendant but by his attorney, who did not state, as required by the rule, that he had knowledge of the facts.

One of the supposed defenses alleged was that the plaintiff could not maintain its suit by reason of the fact that it was a foreign corporation maintaining an office in this state without being licensed to do business here. With respect to this supposed defense the affidavit stated:

> "Affiant further states that the plaintiff is a foreign corporation organized for pecuniary profit and that it was not organized for banking, insurance, building loan and surety company purposes; that it was not, at the time of the filing of the above mentioned suit, and never was licensed to do business in the state of Illinois; that the said plaintiff has been transacting business in the state of Illinois for a number of years last past; that it has maintained an office in the City of Chicago in the building commonly known as the 'Textile Building;' that the name of the plaintiff, 'Worumbo Company,' is painted on the outside door of said office and, as affiant is informed and believes, has paid rent to the office of the build-

ing; that the plaintiff has employed a salesman in Chicago, and other employes in its Chicago office; that it owned, among other property, in the state of Illinois, office furniture and fixtures; that it had a contract with the Chicago Telephone Company for telephone service in its Chicago office under the telephone number of Franklin 0196; that by reason of said contract, the name of Worumbo Company, the plaintiff herein, is listed in the Chicago Telephone Directory; affiant is informed and believes all checks for the payment of all bills incurred by the Chicago office of the said plaintiff are sent from the home office of the plaintiff to Chicago.

"Affiant further states that the agents of the plaintiff have solicited business in the City of Chicago, State of Illinois, and that this transaction is one of many similar transactions conducted by the plaintiff in the state of Illinois."

We think this was insufficient. A contract is not necessarily made in the state where the order for goods is solicited, nor in the state where it is written. It is not a contract until it is accepted, and this affidavit, as the plaintiff points out, contains no averment that the orders upon which the plaintiff sues were accepted in the state of Illinois, or that any agent of the plaintiff was authorized to accept any such orders in the state of Illinois. Further, the affidavit does not aver that the transaction upon which the suit is brought was not one in interstate commerce, and if it was an interstate commerce transaction, then the statute is not applicable. In Bamberger-Stern Co. v. Anderson et al., 207 Ill. App. 222, this court said, in considering a similar question:

"In support of this position appellee urges, and we think correctly, that even though a foreign corporation may be doing business in this state without complying with said act, it can maintain a suit based entirely on an interstate commerce transaction, and that, as under a familiar rule of pleading, the affidavit must be construed most strongly against the pleader, it will be presumed that the transaction sued on was one of that character in the absence of an averment in the affidavit to the contrary."

We hold, therefore, that the affidavit of merits did not sufficiently aver this supposed defense.

As a further defense the affidavit said:

"Defendant admits that on, to-wit, during the month of March, A. D. 1920, he gave to an agent of the plaintiff an order for the articles mentioned in plaintiff's Statement of Claim, but states, however, that the order was a verbal order and was not signed by

ing; that the plaintiff has employed a salesman in Chicago, and other employes in its Chicago office; that it owned, during given period, in the state of Illinois, office furniture and like goods; that it had a contract with the Chicago Telephone Company for telephone service in its Chicago office under the telephone number of Franklin 4148; that by reason of said contract, the name of Parsons Company, the plaintiff herein, is listed in the Chicago Telephone directory; affiant is informed and believes and states that the payment of all bills incurred by the Chicago office of the said plaintiff are sent from the home office of the plaintiff to Chicago.

"Affiant further states that the agents of the plaintiff have solicited business in the City of Chicago, State of Illinois, and that this transaction is one of many similar transactions conducted by the plaintiff in the State of Illinois."

In total this was insufficient. A contract is not necessarily made in the state where the order for goods is solicited, nor in the state where it is written. It is not a contract until it is accepted, and this affidavit, as the plaintiff points out, contains no averment that the orders upon which the plaintiff sues were accepted in the state of Illinois, or that any agent of the plaintiff was authorized to accept any such orders in the state of Illinois. Further, the affidavit does not aver that the transaction upon which the suit is brought was not one in interstate commerce, and if it was an interstate commerce transaction, then the statute is not applicable. In [illegible] Co. v. Anderson et al., 259 Ill. App. 222, this court said, in considering a similar question:

> "In support of this position appellee urges, and we think correctly, that even though a foreign corporation may be doing business in this state without complying with said act, it can maintain a suit based entirely on an interstate commerce transaction, and that, as under a familiar rule of pleading, the allegations must be construed most strongly against the pleader, it will be presumed that the transaction sued on was one of this character in the absence of an averment to the contrary in the affidavit of the appellant."

We hold, therefore, that the affidavit of merits did not sufficiently aver this expressed defense.

As a further defense the affidavit said:

"Defendant admits that on, January, during the course of [illegible] L. R. Hill, he gave to an agent of the plaintiff an order for the articles mentioned in plaintiff's Statement of Claim, and states, however, that the order was a verbal order and was not signed by

the defendant, or by anyone for him.

"Affiant further states that the value of the merchandise mentioned in plaintiff's statement of claim greatly exceeds the sum of Five Hundred Dollars ($500); that no part of the merchandise was received or accepted by him, the defendant; that defendant has paid nothing as earnest money to bind the contract, or in part payment."

It is urged here that this part of the affidavit was sufficient to state a complete defense under the provisions of the Statute of Frauds. That statute is Section 4 of the Uniform Sales Act (Cahill's 1921 Statutes, page 3036) and provides:

> "A contract to sell or a sale of any goods or choses in action of a value of $500.00 or upward, shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receives the same, or give something in earnest to bind the contract, or in part payment; or unless some note or memorandum in writing of the contract of sale be signed by the party to be charged, or his agent in that behalf."

The question raised on the record is whether, under the pleadings, there appears to be a sufficient memorandum of the contracts sued on to comply with these provisions of the statute. The plaintiff's statement of claim sets up written orders which show the names of the parties to the transaction, the dates respectively upon which the goods should be delivered, the terms and conditions upon which the goods were sold, and a detailed description of the specific quantities, styles, colors, etc. The memorandum also specifically states that it contains the entire contract between the parties. Following this the statement sets up a letter from one Charles L. Cohns, who, it avers, and the answer does not deny, was the duly authorized agent of the defendant in that behalf. This letter is dated May 13, 1920, and states: "I have been consulted by Mr. A. Feirstein of 907 West Roosevelt Road, Chicago, with reference to a number of orders given your salesman for the following goods." Following this is a statement of the identical goods sold to him, of pieces, prices, etc., detailed in the written order. The letter then states: "Mr. Feirstein informs me that owing to a backward

season, and owing to existing conditions, he fears that he might have trouble in paying for these goods when same arrive. I advised him that, under the law of Illinois, he was under no obligation to receive the goods and could cancel same at any time before delivery. He has asked me to write you and inquire whether or not it would be agreeable to you if he cancel part of this order and accept the balance when same is shipped.*****"

The statement further sets up a letter from Mr. Cohns dated May 21, 1920, in which, after acknowledging receipt of a letter from the plaintiff which, he says, has been handed to him by Mr. Feirstein for attention, further says: "Under the law of Illinois, unless you have some memorandum of the matters signed by Mr. Feirstein, you cannot recover, and in as much as I am informed that nothing was signed by Mr. Feirstein, he is in a position to cancel these orders at any time he sees fit before delivery. Under the circumstances I have advised him to avail himself of the law and you will please cancel his orders."

The statement also sets up a letter from the defendant himself, dated June 9, 1920, wherein he states: "The order which I placed with your Mr. Helland for Fall I am very sorry to say that I will not be able to except the full order. I am not trying to take advantage of you on account that I am overstocked with light goods and did not receive deliveries on time.***** I will take part of the order what I ordered for Fall inclosed will please find styles."

There is also set up a letter of the defendant, signed by him personally, dated June 10, 1920, in which he says that he has received a letter from the plaintiff stating that it will be inconvenient for the plaintiff to accept cancellation, and that six pieces have been shipped, one of which was mentioned in defendant's letter of June 9th. He says, "This piece I will accept without prejudice to my rights to cancel the order above mentioned. If

this is satisfactory to you and you accept my order placed with you of June 9th, and cancel all the other former orders, I will accept this one piece No. 2493/ and order the Express Company to return the other five mentioned in your letter and I will be glad to accept the other seventeen pieces mentioned in my letter of June 9th, as soon as they are ready. I can see no way out of it but that I will have to cancel the original order given your representative. You will please accept cancellation, as per my letter of May 13th and oblige."

The defendant relies on the case of Western Metals Co. v. Harrison Ingot Metal Co., 303 Ill. 478, where, in discussing the nature of the writing sufficient to satisfy the provisions of the statute, the court said:

> "A paper signed by the party to be charged cannot be incorporated in a paper not signed by him by a reference in the latter. The signed paper must refer to the unsigned paper in clear and distinct terms. (27 Corpus Juris 263.) Oral evidence is inadmissible to connect the several papers or show that they relate to the same transaction. Oral evidence can only bring together the different writings. It cannot connect them. They must show their connection by their own contents. The connection must be apparent from a comparison of the writings themselves. (25 R. C. L. 680; 2 Page on Contracts, 2285; 29 Am. & Eng. Ency. of Law, 2nd ed., 850; Cunha v. Gallery, 29 R. I. 230, 69 Atl. 1001.)"

The defendant argues that the writings here are insufficient because it does not appear that the attorney, Sohns, who wrote the letters, was authorized in writing by the defendant so to do. On this point, however, it is apparent that defendant is mistaken as to the statute applicable. Paragraph 2 of chap. 59, Cahill's 1921 Ill. Rev. Stat., which provides for a memorandum to be "signed by the party to be charged therewith or some other person thereunto by him lawfully authorized in writing, signed by such party" has no reference to the kind of a transaction which is involved here, and to which paragraph 7 of chap. 121a, Cahill's 1921 Ill. Rev. Stats. is applicable. It has been specifically so held in Tibbetts v. Street Ry. Co., 153 Ill. 147,

Duke is satisfactory to you and you accept my order dated with one of June 5th, and cancel all the other Tenor orders, I will accept this one order Do. 7817 and order the Tenors Singing to return the other five conditions in your letter and I will be glad as ever the other correctness please mentioned in my letter of June 8th, as soon as they are ready. I can see no way out of it but that I will have to cancel the original order given your representative. You will please accept responsibility, as per my letter of May 16th and 8/16th."

The defendant relies on the case of Lessing Supply Co. v. Lawson Times Press Co., 204 Ill. 49, where, in discussing the nature of the writing sufficient to satisfy the provisions of the statute, the court said:

"A paper signed by the party to be charged cannot be supplemented by a paper not signed by him by a reference in the latter. The signed paper must refer to the unsigned paper in clear and direct terms. (27 Corpus Juris 231.) Ewel v. Ewel, supra in insufficiently to endorse the second receipt on the ground that they relate to the same transaction. Oral evidence may only bring together the different writings. It cannot connect them. They must also talk about something by that, and indicate, the connection must be apparent from a examination of the writings themselves. (Id. C. J. 1. c. 230; 2 Tiff. on Sales, 1020; 1 Jac. & Walk. 1; Lawson v. Lessing, 20 N. Y. 369; 20 Ill. App. 1.)"

The defendant argues that the writings here are insufficient because it does not appear that the attorney, Quinn, who wrote the letters, was authorized in writing by the defendant so to do. In this point, however, it is apparent that defendant is estopped as to the statute applicable. Paragraph 2 of sec. 28, Ch. 121 Ill. Rev. Stat., which provides the a memorandum is to be signed by the party to be charged (paragraph or some other person thereunto by him lawfully authorized in writing, signed by such party) has no reference to the kind of a transaction which is involved here, and is which paragraph 1 of sec. 1, Ch. 121 Ill. Rev. Stat. is applicable. It has been specifically so held in Tibbetts v. Mikael Mfg. Co., 188 Ill. 247,

and White Eagle Laundry Co. v. Slawek, 296 Ill. 240. In the last mentioned case the Supreme Court stated:

> "Even where the Statute of Frauds requires an instrument to be in writing in order to bind the party, he may, without writing, authorize an agent to sign it in his behalf unless the statute positively requires that the authority shall be in writing."

The specific question before us, therefore, is whether the subsequent letters of the defendant and his attorney refer to the written acceptances of the orders which were delivered by the plaintiff to the defendant, and, if they are so connected, whether such correspondence sufficiently states the essential terms of the contract. It is admitted by the plaintiff that the connection between these different papers, or writings, must appear from their own contents. In other words, that the connection must be apparent from a comparison of the writings themselves. In the Western Metals Co. case, supra, the Supreme Court stated in its opinion that the correspondence would be examined in vain to find the slightest reference to the confirmation; that at no time did the defendant admit that the confirmation correctly stated the terms of the contract, or admit in its correspondence the existence of the confirmation. Here the letters expressly refer to the orders given and directly repudiate them. It would require no oral evidence to establish that the orders set up in the statement of claim are the very same orders which the defendant seeks to repudiate. This appears from the identity of the pieces, from the identity of the goods and from the identity of the circumstances under which the orders were given as stated in the written confirmation and as described in the subsequent correspondence. There are many cases in the books where a memorandum has been held sufficient although the connection between the subsequent statement and the original order was far less clear than it is here; as in Louisville Asphalt Varnish Co. v. Lorick, 2 L. R. A. 814, where a verbal order

and *Pulte Steel Products Co.* v. *Sherry*, 164 Ill. 544. In the case mentioned were the Supreme Court stated:

"Then, when the Statute of Frauds requires an instrument to be in writing in order to bind the party, or act, without writing, authorities are agreed to show it is not sufficient before the statute positively requires that the authority shall be in writing."

The specific question before us, therefore, is whether the agreement between the defendant and the attorney (who is the written manifestations of the agents which were authorized by the plaintiff to the defendant), and, if they are so construed, whether such correspondence sufficiently states the essential terms of the contract. It is admitted by the plaintiff that the correspondence between these different persons, or entities, must appear from their own contents. In other words, that the memorandum must be apparent from a comparison of the writings themselves. In the *Pulte Steel Co.* case, *supra*, the Supreme Court stated in its opinion that the correspondence could be examined to ascertain to find the alleged reference to the conditions; that is to say that the defendant admit that the communication correctly stated the terms of the contract, or admit in its correspondence the existence of the conditions. Here the letters correctly refer to the orders given and already repudiate them. It would require no oral evidence to establish that the orders yet to be the minimum of which are the very same orders which the defendant seeks to repudiate. This appears from the identity of the pieces, from the identity of the goods and from the identity of the circumstances which the orders were given as stated in the written confirmation and as described in the defendant correspondence. There are many cases in the books where a memorandum has been held sufficient although the connection between the agreement mentioned and the original order was far less clear than it is here; as in *Constantine Graphite Products Co.* v. *Pardee*, 2 L. R. A. 321, where a verbal order

was given for paints, with particular description, and the defendant, the buyer, subsequently wrote to the seller, "Don't ship paint ordered through your salesman. We have concluded not to handle it." See also Beckwith v. Talbot, 95 U. S. 289; Ullsperger v. Meyer, 217 Ill. 262; Salmon Falls Mfg. Co. v. Goddard, 14 Howard (U. S. Supreme Court) 446; and Meyer v. Hirsch, 212 Ill. App. 441.

The contention of the defendant on this point is wholly without merit. The Statute of Frauds is not designed to be an instrument of fraud. Indeed, the very pleading which was stricken in this case removes the statute from consideration in that it specifically states that "on, to-wit, the 13th day of May, 1920, he duly notified the plaintiff herein to cancel the orders made in plaintiff's statement of claim."

The judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

was given the notice, with particular emphasis, not the notoriety, but the notoriety, also hope, unfortunately made in the action, "that's why under natural through may defense. We have mentioned you in months in." See also Jacobs v. Tatum, 87 c. 2d, 1[illegible] Gilmore v. Hearn, 4th Cir. 1[illegible] Dunlap Tires Corp. Co. v. Lockwood, 32 Tenn. [illegible] Fact) 140; and Bauer v. Fleming, 1[illegible] App. 4[illegible].

The contention of the defendant on this point is totally without merit. The liability of Frank is not dependent in no an element of fraud. Indeed, the very pleading which was stricken in this case presumes the liability from misrepresentation in that it specifically states that "on, to-wit, the 12th day of May, 1970, he duly notified the plaintiff Dennis in accord the notice made in plaintiff's statement of claim."

The judgment will be affirmed.

AFFIRMED.

McDonald, C. J., and Robertson, J., concur.

318 - 28153

H. J. TATRO, Appellee, vs. CLARENCE B. CRAIG, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

230 Ill. 654

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant in the trial court from a judgment in favor of the plaintiff in a case of forcible detainer. The suit was begun April 1, 1922. There is practically no dispute as to the facts.

Defendant entered into possession of the premises under lease executed on May 1, 1919, between Arthur Charlton as party of the first part and Clarence B. Craig, defendant, as party of the second part. The lessor leased to the defendant the premises in question from May 1, 1919, until April 30, 1920, "provided sixty days written notice is given lessor by lessee of lessee's intention to terminate this lease on said last mentioned date, otherwise this lease, including all covenants and conditions therein, shall continue from year to year until terminated by like notice in some ensuing year. Lessor is entitled to terminate this lease upon like notice to lessee at like dates, by mailing said notice to the within named premises, addressed to said lessee."

The rent reserved in the lease was $29 a month. In the latter part of March, 1920, Charlton, then the landlord, informed defendant that the rent from May 1, 1920, to April 30, 1921, would be $33 a month. Defendant agreed to this and paid that rent during that year. March 9, 1921, Charlton wrote to defendant that beginning with May 1, 1921, the rental of the apart-

ment would be $40 a month, and thereafter defendant paid that sum as rent.

In January, 1922, the plaintiff became the owner of the premises and on January 30th thereafter served a written notice upon the defendant that his lease would terminate on March 31, 1922, and stated: "You are now hereby required to surrender possession of said premises to me on that day." The plaintiff testified that he called on defendant before serving him with the notice and that defendant told him that he had no lease and would vacate on May 1st. This oral conversation could, however, have no effect on the defendant's rights under the written lease, which by its terms clearly was not to expire until April 30th. On the undisputed facts, the notice was unavailing to terminate defendant's tenancy, and the finding and judgment should have been for the defendant.

The judgment is therefore reversed without remanding the cause.

REVERSED.

McBurely, P. J., and Johnston, J., concur.

326 - 28161

(3216)

NATIONAL IRON AND STEEL COMPANY, a Corporation,
Appellee,

vs.

ROBERT W. HUNT et al., etc.,
Appellants.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

220 I.A. 634

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment in the sum of $4688.24 entered in favor of the plaintiff and against the defendants, after motions for a new trial and in arrest of judgment had been overruled by the court upon a remittitur of $5311.76 from the verdict of $10,000 returned by the jury.

The case was before this court on a former appeal. See National Iron & Steel Co. v. Robert W. Hunt et al., 192 Ill. App. 215. There the judgment which had been entered in favor of the defendants upon sustaining their demurrer to the plaintiff's declaration was reversed, this court holding contrary to the trial court, that plaintiff's declaration set up a cause of action. The defendants now contend that "The Appellate Court, in its opinion heretofore rendered, misconceived the law applicable to this case."

The personnel of the Judges of this court has changed since the former decision was rendered. It might and might not be that if the court as now constituted was free to consider the case as one of first impression, the arguments of defendants would be found convincing. This is now wholly immaterial. The maxim interest reipublicae ut sit finis litium is controlling. If we have heretofore erred, the Supreme Court is the only tribunal which may correct our error. We may not again consider the legal propositions which were necessary to a decision of

[illegible]

NATIONAL IRON AND WIRE COMPANY, a Corporation,
Appellee,

vs.

[illegible] et al., etc.,
Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

[illegible]

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a judgment in the sum of [illegible] entered in favor of the plaintiff and against the defendants, after motions for a new trial and in arrest of judgment had been overruled by the court upon a remittitur of [illegible] from the verdict of [illegible] returned by the jury.

The case was before this court on a former appeal. See National Iron & Wire Co. v. [illegible] et al., [illegible] Ill. App. [illegible]. There the judgment which had been entered in favor of the defendants upon sustaining their demurrer to the plaintiff's declaration was reversed, this court holding contrary to the trial court, that plaintiff's declaration set up a cause of action. The defendants now contend that "the appellate court, in its opinion heretofore rendered, misconceived the law applicable to this case."

The personnel of the judges of this court has changed since the former decision was rendered. It might and might not be that if the court as now constituted was free to consider the case as one of first impression, the arguments of defendants would be found convincing. This is now wholly immaterial. The maxim interest reipublicae ut sit finis litium is controlling. If we have heretofore erred, the Supreme Court is the only tribunal which may correct our error. We may not again consider the legal propositions which were necessary to a decision of

the case on the former appeal. It has been so held in a long line of decisions. Garrett v. Peirce, 84 Ill. App. 31; Johnson v. Von Kettler, 84 Ill., 315; Wilson v. Carlinville Nat'l Bank, 87 Ill. App. 364; Landt v. McCullough, 130 Ill. App. 515; Ruprecht v. Henrici, 127 Ill. App. 350; Delta Bag Company v. Kearns, 160 Ill. App. 93; Mariner v. Ingraham, 230 Ill., 130; In re Maher Estate, 204 Ill. 25.

The questions of law now argued at length as to whether one who contracts with another to inspect materials is liable to third parties who have no contractual relations with the one who contracts for the inspection negligently made or certified, whether proof of usage or custom is admissible to extend and enlarge the scope of a contract between the parties thereto so as to include third persons not privy thereto, are made wholly immaterial by the former decision of this court, by which we are bound.

Considering the facts, defendants assert that there is no evidence of any act or acts of negligence on their part, or that if such is held to have been proven, it can only be by basing a presumption upon a presumption, which is not permissible; that the evidence in the record is just as consistent with the non-existence of negligence as with its existence, and that at most the evidence can only be said to indicate a mistake or error of judgment on the part of the experts.

We think the allegations of the declaration were sustained by the evidence, at least that the jury was justified in so finding. The evidence tends to show that on May 20, 1913, plaintiff purchased from M. M. Foster Company of Baltimore, 355 tons of first-class 60 lb. relaying rails; that the contract provided that these rails should be subject to certificate of inspection issued by the defendants, who were among the best

the case on the forged covers. It has been so held in a long line of decisions. Barrett v. Tatum, 38 Ill. 329, 333; Johnson v. The Sheriff, 46 Ill., 488; Wilson v. Continental Ins. Co. 49 Ill. App. 324; Lamb v. Hollingsworth, 130 Ill. App. 629; Campbell v. Sinclair, 177 Ill. App. 370; Delia Ins Co. Lemon v. Lemon, 180 Ill. App. 69; Durham v. Interboro, 208 Ill., 280; Ex re Duke Estate, 304 Ill. 94.

The question of law now raised at trough on is whether one who contracts with another to transport materials is liable to third persons who have no contractual relations with the and who sustained injuries by the negligent work or conduct, without proof of wrongs or course in obtaining the extent and omission the cause of a contract between the parties to see as to include third persons not privy thereto, are made wholly dependent by the former relation of this court, by which we are bound.

Considering the facts, defendants argued that there is no evidence of any act or note of negligence on their part, or that if such it did in fact have been proven, it was only on by finding a proximation upon a presumption, which is not warranted; that the evidence in this record is just as consistent with the non-existence of negligence as with its existence, and that at most the evidence can only be said to indicate a mistake or error of judgment on the part of the driver.

To claim the allegations of the declaration were supported by the evidence, it is true that the jury was justified in so finding. The evidence tends to show that on May 27, 1919, plaintiff operated Truck 7, E. Ridge Township of Pullman, and that of Plant-place on the Michigan road; that the machine provided that there with should be subject to certificate of inspection issued by the Commission, who were among the same

known experts in that line doing business in the country; that the rails were old rails that had been in use for some years by an electric railroad operating on Coney Island in New York; that the railroad sold these used rails to Jos. Joseph & Bros., who in turn sold them to H. M. Foster Company; that H. M. Foster Company hired defendants to inspect the rails at the time of purchasing the same and that defendants did inspect the same through one of their employees and thereupon issued a written certificate stating that these rails, then in the cars of the Long Island Railroad Company, were first-class 60 lb. relaying rails; that the rails were 1348 in number; that while in the cars of the railroad company the same were sold by H. M. Foster Company to the plaintiff, National Iron and Steel Company of Houston, Texas; that neither H. M. Foster Company nor any agent of the plaintiff saw these rails prior to the sale and that both of them in buying the same relied on the certificate of defendants; that defendants knew of such sales and knew that the purchasers were relying on their certificates; that H. M. Foster Company drew a sight draft on plaintiff for the purchase price of the rails with 25¢ per ton additional charged to cover the cost of inspection; that upon arrival of the rails in Texas, plaintiff paid the draft and took up the bill of lading without any examination of the rails.

Defendants say that the proof fails to show that the rails delivered in Texas were the identical rails inspected at Coney Island. In this statement they are, we think, clearly mistaken. The evidence shows without contradiction that these rails, after the inspection at Coney Island and prior to the sale to plaintiff, stood in the yards of the Long Island Railroad Company under the care and protection of its employees; that after the sale and pursuant to instructions the railroad company

issued a bill of lading therefor; that the rails were then moved to Bushwick Station, Brooklyn, where the same were delivered to a lighterage company, which thereafter delivered them to the Mallory Steamship Company; that the same were then placed on the steamship "Denver," which carried the rails to Galveston, Texas, these being the only rails carried on that trip by this ship; that at Galveston the steamship company delivered the rails to a railroad company which gave its receipt therefor, and thereafter carried the rails to Fredricksburg Junction, Texas, at which place plaintiff had contracted to sell and deliver the same to one Crane; that upon the arrival of the rails there Crane notified the plaintiff that the same were not first-class as certified, and refused to accept them; that a representative of plaintiff, a Mr. Cohn, was then sent to Fredricksburg Junction and had the rails reconsigned in the same cars to San Antonio, Texas; that defendants were then notified of the facts by plaintiff, who asked them for a reinspection of the rails, which they refused except upon condition that plaintiff would guarantee the expense of the same, which plaintiff did; whereupon defendants sent an inspector, named Collins, who, with another inspector, one Wilson, representing the plaintiff, then inspected the rails, which they reported to be 1347 in number. While there is some conflict, a preponderance of the evidence shows that the identification mark used by the defendants, namely, the letter N within a shield, and which the testimony for defendants shows was impressed upon each rail by its inspector at Coney Island, was found on practically all the rails when examined in Texas. It does not appear that Collins ever raised any question as to the identity of the rails inspected. We think this identity is established beyond any doubt. The evidence shows that the rails left the docks

in New York on June 7, 1913, and arrived at Galveston on June 13th thereafter. Nothing was shown to have occurred which could have materially altered the physical condition of these rails during transit.

Conceding the fact established by an overwhelming preponderance of the evidence, that there were no first-class rails among the whole number inspected in Texas, the inference is necessary and clear that the inspection at Long Island must have been negligently made. There is no question of res ipsa loquitur or presumption upon presumption, as defendants argue. The inference is direct, plain and necessary. These facts are settled by the verdict of the jury. The law is settled by our former decision. If the questions of law were correctly decided on the former appeal, as we must presume they were, then the judgment should be affirmed, and it is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

346 - 28181

NELLIE HANCOCK,
Appellee,

vs.

THE NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This cause is not a stranger in this court nor in the Supreme Court of the State. (See Hancock v. National Council of the Knights and Ladies of Security, 222 Ill. App. 647, and 308 Ill. 66.) The history in brief is that plaintiff sued defendant as the beneficiary in a policy of insurance issued by the defendant to her brother Patrick Foley, deceased. The cause was tried by a jury and verdict and judgment given for the plaintiff, which was affirmed in this court but reversed by the Supreme Court, which held as a matter of law that certain statements appearing in the application for insurance were warranties which, if untrue, rendered the policy void, whether the statements were or were not known to be untrue by the applicant. The cause has been again tried by a jury and at the conclusion of all the evidence the court instructed the jury to find for the plaintiff. Judgment was entered upon the verdict so rendered for the full amount claimed to be due under the policy.

The evidence shows that at the time of making his application for the certificate, Patrick Foley was asked whether either of his parents had been afflicted with consumption, to which he answered "No," and the defense sought to be interposed was that this answer was in fact untrue, it being asserted that as a matter of fact Mary Foley, the mother of said Patrick Foley,

BRIEFS SUBMITTED.

(continued)

vs.

THE AUTHORITY COUNCIL OF THE
TERRITORY AND LEAGUE OF TERRITORY,
(Defendant).

MR. JUSTICE MCCARTHY DELIVERS THE OPINION OF THE COURT.

This cause is now a stranger in this court now in the Supreme Court of the State. (See Cameron v. National Council of the Elderly and Leagues of Territory, vol 121, Ohio, 647, 4d 324 121, 64.) The history is brief to that effectively used in causes as the beneficiary in a policy of insurance issued by the defendant to her husband (Ohio Policy, Cameron). The cause was tried by a jury and verdict and judgment given for the plaintiff, which was affirmed in this court but reversed by the Supreme Court, which held as a matter of law that material misrepresentations in the application for insurance were warranties which, if untrue, invalidated the policy and, whether the warranties were or were not known to be untrue by the applicant. The cause was then retried by a jury and at the conclusion of all the evidence the court instructed the jury to find for the plaintiff. Judgment was entered upon the verdict in favor of the full amount claimed to be due under the policy.

The evidence shows that at the time of making his application for the certificate, Joseph Cary was aware that either of his parents had been afflicted with tuberculosis, in which he included "TB," and the jurors could be interpreted as that this answer was in fact untrue, it being uncontested that on a number of face many times, the mother of said insured "died

died and that the cause, or one of the causes of her death was pulmonary tuberculosis. The evidence by which the defendant endeavored to establish this defense was excluded by the court, and the controlling question in the case is whether the court erred in so ruling.

The document which was offered in evidence and excluded by the court is as follows, the italicized portions being written in long hand and the remainder of the document typewritten.

"BUREAU OF VITAL STATISTICS

DEPARTMENT OF HEALTH: CITY OF CHICAGO

UNDERTAKER'S REPORT OF DEATH.

1. Name of Deceased (in full) Mary Foley.

2. Sex f. Color w. 3. Place of birth of deceased (State or Country, if outside of Chicago). Ireland. Father's Birthplace. Ireland. Mother's Birthplace.

4. Age 57 years months days. 5 Lived in Illinois 7 years, in Chicago years months days.

6. Died on the 11 day of Jan. 1907, at about 2:30 A.M.

7. Widowed. Occupation House Keeper.

8. Place of Death: 224 Aberdeen St. Ward.

9. Place of Burial: Mt. Carmel) 10. Undertaker: M.J.Redmond) License
Date of Burial: Jan 14 1907) Address: 875 W. 12th St) No. 370.

Hour M. Tel.

PHYSICIAN'S CERTIFICATE OF CAUSE OF DEATH.

I hereby certify That, to the best of my knowledge and belief, the cause of death of the above named and described deceased was as hereunder written.

CAUSE OR CAUSES OF DEATH
Immediate and Determining. Pulmonary Tuberculosis.

DURATION OF CAUSE OR CAUSES.
Years. Months. Days. Hours.
1.

Contributing Cause or Complication.

Witness my hand, this 11th) (Signature:) T.F. O'Malley M.D.
day of Jan. 1907.)

Address: 1543 W. 12th St.

Tel. West 1142."

died and that the cause, or one of the causes of her death was pulmonary tuberculosis. The evidence by which the defendant endeavored to establish this defense was excluded by the court, and the controlling question in the case is whether the court erred in so ruling.

The document which was offered in evidence and excluded by the court is as follows, the italicized portions being written in Jane Doe and the remainder of the document typewritten.

"BUREAU OF VITAL STATISTICS

DEPARTMENT OF HEALTH: CITY OF BALTIMORE

DEPARTMENT'S REPORT OF DEATH.

1. Name of deceased (in full) *Jane Doe.*

2. Sex *F.* Color *y.* 3. Place of birth of deceased (state or country, if outside of Baltimore). *Ireland.* Father's Birthplace. *Ireland.* Mother's Birthplace.

4. Age *27* years months days. 5. Lived in Baltimore years, in Ward years months days.

6. Died on the *31* day of *Jan.* *1907*, at about *2:30* A.M.

7. Disease. Cause *Pulm. Tuber.*

8. Place of death *City Hospital.* Ward.

9. Place of burial: *Jan.* Cemetery: *Bal.* Cemetery Ref. (Cemetery) Sheet
Date of burial: *Jan 34* (Cemetery) *Sec. 1. Lot 23* No. *27.*
Sheet *K.* *Ind.*

"CERTIFICATE OF CAUSE OF DEATH.

I hereby certify that, to the best of my knowledge and belief, the cause of death of the above named and described deceased was as hereunder written.

CAUSE OF DEATH OF DEATH
Immediate and Determining. *Pulmon. Tuberculosis.*

DURATION OF DISEASE OF CAUSE.
Years. Months. Days. Hours.
4.

Contributing Cause or Complication.

Place of Death. Ward *City Hospital.* (Signature) *T.E. Pediatric E.*
Day of *Jan. 1907.* (Address) *Lot. Lots 23.*

Ind. Date *Lots 23.*"

Attached to this certificate is a paper designated "Certified Copy of Birth or Death Certificate," in the following words:

"STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, ROBERT M. SWEITZER, County Clerk of the County of Cook, in the State aforesaid, and Keeper of the Records and Files of said County, do hereby certify that the attached is a true and correct copy of the Original Certificate of Death of Mary Foley on file in this office and recorded in Volume No. 53, Page 88, Register of Death, all of which appears from the records and files in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the County of Cook, at my office, in the City of Chicago, in said County, this 12th day of November, A. D. 1919.

ROBT. M. SWEITZER,
County Clerk."

The impression of the seal of the county also appears thereon.

The plaintiff insists that this document was properly excluded because, she says, there was no proper identification of the Mary Foley named in said certificate with Mary Foley, mother of the deceased. There was, however, evidence tending to show identity of name, identity of place of birth, identity of marriage, identity of place of death, burial and occupation, which we think was prima facie sufficient. Moreover, this specific objection was not made to the certificate when it was offered in evidence and a general objection such as was made by the plaintiff is not sufficient to preserve this question for consideration in this court. City v. Gilsdorff, 258 Ill. 218, and Gage v. Eddy, 186 Ill. 432.

The only question, therefore, necessary to consider is whether the certificate was competent. The plaintiff insists that on the former appeal this court specifically held that the document offered was an "Undertaker's Report," 228 Ill. App.

attached to this certificate is a paper designated "Certified Copy of Birth or Death Certificate," in the following words:

"State of Illinois
County of Cook } ss.

I, ROBERT E. DARCY, County Clerk of the County of Cook, in the State aforesaid, and keeper of the Records and Seal thereof, do hereby certify that the enclosed is a true and correct copy of the original Certificate of Death of Mary Jones on file in this office and recorded in Volume 6. Pg. Page 6, Register of Death, all of which appears from the records and files in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of the County of Cook, at my office, in the City of Chicago, in said County, this 21st day of November, A. D. 1928.

ROBERT E. DARCY,
County Clerk."

The importance of the seal of the county clerk appears herein.

The plaintiff insists that this document was properly admitted because, she says, there was no proper identification of the Mary Jones named in the certificate with Mary Tiffy, mother of the deceased. There was, however, evidence tending to show identity of name, identity of place of birth, identity of marriage, identity of place of death, marital and employment which we think was prima facie sufficient. However, this specific objection was not made to the certificate when it was offered in evidence and a general objection was made by the plaintiff. It was sufficient to preserve this question for consideration in this court. City v. Sikowski, 304 Ill. 414, and Kemp v. Kelly, 240 Ill. 434.

The only question, therefore, necessary to consider is whether the certificate was competent. The plaintiff insists that as the former appeal this court specifically held that the document offered was an "undertaker's report," 280 Ill. 489,

647, supra. A document so designated is referred to in the opinion there filed but there is nothing in the record now before us from which it may be inferred that the particular document which we must now consider was before us there. The paper here in evidence does not purport to be made or signed by the undertaker. It does purport to be signed by "T. F. O'Malley, M. D.," who, there is competent evidence tending to show, was the physician attending Mary Foley, the mother of Patrick Foley, in her last illness.

The statute which provides for the keeping and certification of records of births and deaths is found in Gallaghan's Illinois Laws, 1913-1916, pages 1574 to 1585. That statute provides that the State Board of Health shall have charge of the registration of births, stillbirths and deaths throughout the State; that the secretary of the State Board of Health shall be the superintendent of such registration of births, deaths, etc. Section 7 of the Act provides that the certificate of death shall contain at least the items of the Standard Certificate of Death, approved and adopted by the United States Bureau of the Census; that the personal particulars shall be authenticated by the signature and address of the informant who shall be the nearest of kin or other competent person acquainted with the facts; that the medical certificate shall be made and signed by the legally qualified physician, if any, last in attendance, or coroner, or by the local registrar as provided for in section 8 of the same Act.

Section 9 of this Act makes it the duty of the undertaker to procure and file the death certificate, and directs that he shall present the certificate to the attending physician, if any, or to the coroner, if so directed by the local or sub-registrar, for the medical or coroner's certificate of the cause of death and other particulars necessary to complete the record;

847, MINTZ. A document as described is referred to in the opinion there filed but there is nothing in the record now before us from which it may be inferred that the particular document which we must now consider was before us there. The paper here in evidence does not purport to be made or signed by the undertaker. It does purport to be signed by "J. T. O'Malley, M. D.," who, there is competent evidence tending to show, was the physician attending Mary Foley, the mother of Patrick Foley, in her last illness.

The statute also provides for the keeping and certification of records of births and deaths in found in Gallagher's Illinois Laws, 1923-1924, page 2274 to 2280. That statute provides for the State Board of Health shall have charge of the registration of births, stillbirths and deaths throughout the State; that the secretary of the State Board of Health shall be the superintendent of such registration of births, deaths, etc. Section 7 of the act provides that the certificate of death shall contain at least the items of the Standard Certificate of Death, approved and adopted by the Public Health Bureau of the Census; that the personal particulars shall be authenticated by the signature and address of the informant who shall be the nearest of kin or other competent person acquainted with the facts; that the medical certificate shall be made and signed by the legally qualified physician, if any, last in attendance, or coroner, or by the local registrar as provided for in section 8 of the same act.

Section 8 of that act makes it the duty of the undertaker to procure and file the death certificate, and directs that he shall procure the certificate to the attending physician, if any, or the coroner, if so directed by the local or sub-registrar, for the medical or coroner's certificate of the cause of death and other particulars necessary to complete the record;

that he shall then state the facts required relative to the date and place of burial over his signature and with his address, and present the completed certificate to the local or sub-registrar within the time limit for the issuance of a burial or removal permit.

Paragraph 10616 (17) provides that the State Board of Health shall prescribe all forms of reports of births, deaths, etc., and shall prepare, print and supply all local registrars with copies of all blanks and forms sufficient to carry out the provisions of the act; and shall prepare and issue such detailed instructions as may be required to procure the uniform observance of its provisions and the maintenance of a perfect system of registration and no other blanks shall be used than those supplied by the State Board of Health.

Section 20 provides that the State Board of Health, any local registrar or any county clerk shall, on request, furnish a certified copy of the record of any birth, etc., to any applicant entitled to the same upon the payment by such applicant of a prescribed fee; and that "Any such copy of a birth, stillbirth or death, when properly certified to by the State Board of Health or the local registrar or the county clerk, shall be prima facie evidence in all courts and places of the facts therein stated."

Prior to offering the certificate in question the defendant introduced in evidence an instrument certified by the Acting Secretary of the Illinois State Board of Health to be a true copy of the rules adopted by the said board in force from and after the 8th day of July, 1903. This was certified as of the date of December 5, 1913. These rules direct that certificates of death made in accordance with the provisions of the Act, shall contain, in the order stated, the name of the county in which the death occurred, the full name of the deceased, the sex, color, the age, (Years, months and days) the place of birth,

that he shall then state the facts required relative to the date and place of burial over his signature and with his address, and attach the completed certificate to the legal or representative within the time limit for the issuance of a burial or removal permit.

PARAGRAPH THREE (3) provides that the State Board of Health shall prescribe all forms of reports or records, death, etc., and shall prepare, print and supply all local registrars with copies of all blanks and forms sufficient to carry out the provisions of the act; and shall prepare and issue such detailed instructions as may be required to procure the uniform observance of the provisions and the maintenance of a perfect system of registration and to other blanks shall be used than those supplied by the State Board of Health.

PARAGRAPH SIX provides that the State Board of Health, or local registrar or any county clerk shall, on request, furnish a certified copy of the record of any birth, etc., to any applicant entitled to the same upon the payment by such applicant of a prescribed fee; and that "Any such copy of a birth, stillbirth or death, when properly certified to by the State Board of Health or the Local Registrar or the county clerk, shall be prima facie evidence in all courts and places of the facts therein stated."

Prior to effecting the activities in carrying the enforcement intended in evidence on instruments certified by the Acting Secretary of the Illinois State Board of Health to be a true copy of the rules adopted by the said Board in force from and after the 1st day of May, 1902. This was certified as of the date of December 8, 1924. These rules direct that certificates of death made in conformance with the provisions of the act, shall contain, in the order stated, the name of the county in which the death occurred, the full name of the deceased, the sex, color, the age, (years, months and days) the place of birth,

(state or country) the number of years the deceased lived in the State of Illinois, the occupation, the conjugal condition, whether single or married, widower or widow, the date of death (hour, day, month and year), the place of death (township, village or city, if in city, the number of street and ward); place of burial, the date of burial, the name of undertaker, the address of undertaker, the immediate cause of death, with the duration thereof (years, months, days and hours), and the contributory cause or complication with duration thereof (years and months). These rules further provide that the certificate shall be signed by the physician last in attendance upon the deceased, or by the coroner, who shall attest that the personal particulars relative to deceased as stated are true to the best of his or her knowledge and belief, and that the cause of death of the deceased was as written in the certificate; that the certificate shall be written plainly in ink, and shall be signed by the person making the same who shall give his or her address and date the certificate when made.

The provision of the statute which provides that such a record when certified by the county clerk shall be prima facie evidence in all courts and places of the facts therein stated, makes it unnecessary for us to decide whether the record offered here would have been admissible under the rules of common law; and, needless to say, it is also unnecessary for us to decide how much weight should be given to the facts as stated in the certificate. The instrument on its face purports to be a record kept by public officials, whose duty it is to compile and preserve these records. The legislature has seen fit as a matter of public policy to declare that these records shall be prima facie evidence of the facts therein stated, and there being evidence from which the jury might properly conclude that this record offered referred to the history of Mary Foley, the mother of Patrick Foley,

(state or country) the number of years the deceased lived in the state of Illinois, the occupation, his marital condition, whether single or married, widower or widow, the age of years (year, month and day), the place of death (township, village or city, if in city, the number of street and ward); place of burial, the date of burial, the name of undertaker, the address of undertaker, the immediate cause of death, with the duration thereof (years, months, days and hours), and his residence were or complicated with duration thereof (years and months). These rules further provide that the certificate shall be signed by the physician last in attendance upon the deceased, or by the coroner, who shall attest that the personal particulars relating to deceased in states are true to the best of his or her knowledge and belief, and that the cause of death of the deceased was as written in the certificate; that the certificate shall be written plainly in ink, and shall be signed by the person making the same. He shall give his or her address and date the certificate when made.

The provision of the statute which provides that such a record when certified by the county clerk shall be prima facie evidence in all courts and places of the first Parsis state, makes it unnecessary for us to decide whether the records offered here would have been admissible under the rules of common law; and, needless to say, it is also unnecessary for us to decide how much weight should be given to the facts as stated in the certificate. The instrument on its face purports to be a record kept by public officials, where duty it is to compile and preserve these records. The legislature has seen fit as a matter of public policy to declare that these records shall be prima facie evidence of the facts therein stated, and there being evidence from which the jury might properly conclude that this record offered referred to the history of Mary Daley, the mother of Patrick Daley,

we think the court erred in excluding it. For this error the judgment will be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

McHurely, P. J., and Johnston, J., concur.

367 - 28202

N. L. MOODY,
Appellee,

vs.

HUBERT J. SCHWALL,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

230 I.A. 654

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $130 entered upon the verdict of a jury. The verdict was for the sum of $140, but a remittitur of $10.00 was required by the court upon defendant's motion for a new trial.

The suit was begun originally before a Justice of the Peace, the plaintiff suing for commission claimed to be due on account of the sale, at defendant's request, of a piece of real estate situated west of Wilmette in Cook County. There is little dispute as to the facts in the case.

At the time of the transaction plaintiff lived in Wilmette and was engaged in the real estate business there. The land was a small farm of about four acres located on Reinwald avenue about two miles from Grosspoint. This farm was in the name of Mrs. Schwall, the wife of the defendant, and defendant listed it for sale with the plaintiff at the price of $4000. Nothing was said at that time about the amount of the commission, but if a commission has been earned for the sale of the property, it is not denied that the amount for which judgment was entered is the usual and customary compensation.

After the farm was listed, one Robert J. Kroschel came to plaintiff's office about the 18th of March, 1918, inquiring about a farm, and plaintiff took him out to this listed farm and they looked it over, and at the same time talked with Mrs. Schwall, who said that she would have to talk with her husband when he came

home. At that time Kroschel paid to plaintiff the sum of five dollars, as plaintiff says "to clinch the deal."

On the first of April the defendant and Kroschel made a certain document in writing, which is designated "Agreement and Option." It provides therein that Schwall agrees to sell on the first day of April, 1919, for $4000.00, the property listed; that Kroschel agrees to pay "on such option the sum of $100.00 on the date of this agreement, said money to be applied on purchase price whenever deal is consummated." It further provides that Kroschel agrees to pay "as rent" for the premises for the term from April 1, 1918, to March 31, 1919, the sum of $204, payable in monthly installments in advance. Further, "Purchase price of $4,000.00 to bear interest at the rate of 6 per cent per annum, and the rent paid during the term of this agreement to apply on such interest. Party of the first part agrees to furnish at the time the purchase price is paid to the party of the second part a good and sufficient warranty deed, and a guaranty title." The agreement further provides that if Kroschel fails to fulfill his part, then the agreement shall be null and void and the amount paid for the option forfeited.

On April 1, 1919, the parties entered into a writing described as a "Real Estate Contract." It provided for the sale by Schwall and the purchase by Kroschel of the real estate at a price of $4000; Kroschel to pay all taxes and assessments levied after the year 1918, and recited that the purchaser had paid the sum of $200 as earnest money to be applied on the purchase when consummated.

The evidence further shows that this agreement was carried out and that a warranty deed was executed by Schwall and wife, conveying the premises in joint tenancy to Robert J. Kroschell and Clara M. Kroschell, his wife.

been. It does give student pain to question the use of five options, an priority? Keys "to obtain the goal."

In the final of April the defendant and Prosecutor made a marital agreement in writing, which is designated "agreement and option." It provides therein that Donnell agrees to pay on the first day of April, 1972, for plaintiff, the property listed that Donnell agrees to pay "at such action the sum of $[illegible] on the date of this agreement, and money is to credit on property which shall be determined." It further provides that Donnell agrees to pay "as soon" for the premiums for the term then April 1, 1973, in March 31, 1978, the sum of $[illegible], payable in monthly installments in advance. Further, "purchase price of $[illegible] to be based interest at the rate of 8 per cent per annum, and the wife will during the time of this agreement to apply on such interest. Title of the lien and express is issues is the time the purchase price is paid to the party of the second part a gift and sufficient warranty deed, and a quitclaim title." The agreement further provides that if Donnell fails in fulfill his part, then the agreement shall be null and void and the amount paid for the option forfeited.

On April 1, 1972, the parties entered into a writing designated in a "Joint Entire Contract." It provides for the sale by Donnell and the purchase by Donnell of the real estate at a price of $[illegible] Donnell to pay all liens and encumbrances behind after his death, and recited that the parties had the sum of $[illegible] on account money is to applied on the purchase price.

The evidence further shows that this agreement was carried out and that a warranty deed was executed by husband and wife, conveying the premises in joint tenancy in Robert T. Donnell and Clara M. Donnell, his wife.

At the close of all the evidence the defendant asked for a peremptory instruction, which was denied. The appellant argues that this instruction should have been given, claiming that on the uncontradicted evidence the plaintiff might not recover commission for the sale. He says that in order to be entitled to recover in such a case, the broker must produce a customer who is ready, able and willing to purchase the property, and not one who is only willing to purchase an option. A single case is cited and relied upon, namely, Lawrence v. Rhodes, 136 Ill. 96. We think that case is clearly distinguishable from this one. It appeared from the evidence there that a contract was made which gave to the purchaser the option to buy according to the terms of the contract or to forfeit the earnest money. It further appeared, however, that the purchaser had definitely refused to exercise the option and that the vendor had returned the earnest money and released the vendee from all liability under the contract. In this case the option taken by the vendee was exercised by him and the sale completed according to its terms.

It is undoubtedly the law that a broker who is employed to find a buyer is not entitled to a commission if the extent of his service is merely to produce a customer who takes an option, but if in such case the vendor, upon the production of the customer, enters into an option agreement with him which is thereafter completed according to its terms, it would seem that the broker would be entitled to his commission. We think, on the undisputed facts in this case, the broker produced a customer who was not only willing and able to buy at the price asked, but who did buy for the purchase price at which the property was listed, and plaintiff was therefore entitled to his commission.

Appellant criticizes some of the instructions given,

At the close of all the evidence the defendant asked for a peremptory instruction, which was denied. The appellant argues that this instruction should have been given, claiming that as the uncontradicted evidence the plaintiff alone had power revocation for his sole. He says that in order to be entitled to recovery in such a case, the broker must produce a purchaser who is ready, able and willing to purchase the property, and not one who is only willing to purchase on option. A single case is cited and relied upon, namely, Lawrence v. Fulton, 121 Ill. 80. It claims that case is clearly distinguishable from this one. It appears from the evidence there that a contract was made which gave to the purchaser the option to buy according to the terms of the contract or to retain the earnest money. It further appeared, however, that the purchaser had definitely refused to accept the option and that the vendor had returned the earnest money and released the vendee from all liability under the contract. In this case the option taken by the vendee was exercised by him and the sale completed according to the terms.

It is undoubtedly the law that a broker who is employed to find a buyer is not entitled to a commission if the act of his service is merely to produce a purchaser who turns an option, but if he does use the vendee, upon the production of the purchaser, merely for an option agreement with him which is thereafter complied according to its terms, it would seem that the broker would be entitled to his commission. In this, as in the distinguished Tuohy case in 121 Ill., the broker produced a purchaser who was not only willing and able to buy at the price asked, but who did buy for the purchase price at which the property was listed, and plaintiff was therefore entitled to his commission. Doubtful attitude was of the instructions given,

but as we view the record, any error therein was harmless.

In view of the undisputed facts, the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

380 - 28215

C. H. MUSSELMAN, Doing Business as C. H. Musselman Canning Co., Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
vs.	
HARRY DUSHOFF, Doing Business as Harry Dushoff & Co., Appellant.	

290 I.A. 654

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment in the sum of $1250.00 entered on the verdict of a jury. Motions for a new trial and in arrest of judgment were overruled, and this appeal by the defendant followed. At the close of all the evidence the defendant made a motion that the jury be instructed to bring in a verdict for the defendant. This was denied and errors assigned and argued are apparently based on this ruling.

The case, as alleged in the pleadings and established by the evidence, was brought by the plaintiff upon a contract dated May 30, 1919, whereby plaintiff sold to defendant 2,500 dozen number 10 special brand canned apples, 1919 pack, at the price of $6 a dozen, f. o. b. the factory at Biglerville, Pa. The contract stated that shipment was to be at seller's convenience and, further, that if at the time the goods were ready for shipment the financial condition of the buyer had become impaired or unsatisfactory to the seller, the buyer should, upon reasonable notice and demand from the seller, make payment in advance of the shipment, less cash discount; otherwise the contract might be cancelled at the option of the seller without further notice, and all liability thereunder should thereupon cease and be determined.

On September 12th after the making of the contract, plaintiff wrote defendant that it was packing the apples, which

had ripened earlier that year than the year before, and stating that if defendant would give routing and delivery instructions so that shipment could be made at plaintiff's convenience, it would assure defendant of its very best service.

Again, on September 19th, plaintiff wrote stating that it had expressed to defendant two sample cases of the apples which plaintiff was then packing, stating that the growers were then packing their winter fruit, and adding: "If you are interested in having us give you our very best packing, it is essential that we have your shipping instructions." This letter was in reply to a letter from defendant, dated September 15th, acknowledging receipt of plaintiff's letter of the 12th, in which defendant stated:

> "In as much as we have resold the contract with you, we must get shipping instructions from the party to whom we resold these goods before we can give you shipping instructions. We will try to get shipping instructions from the party to whom we resold these goods as soon as possible and in turn will forward them to you, but do not ship until we receive these shipping instructions."

November 11th, 1919, defendant again wrote plaintiff, stating:

> "that owing to the fact that we resold these goods to a concern in Buffalo, we could not give you shipping instructions until we received the same from them, but it seems that of late we were unable to get any instructions neither have they answered any of our correspondence, so we will be obliged to have you ship goods to us here.
>
> "Due to the fact that so many shipments of canned goods have been made to us at one time, we are obliged under the circumstances, to ask you to ship the 2500 cs. Cal. Apples, on sixty day trade acceptance.
>
> "We refer you to the National Bank of The Republic and Greenebaum Sons Bank & Trust Co., Chicago.
>
> "Should you be unwilling to make shipments on these terms which we are obliged to request, we will accept cancellation."

The defendant's place of business was in Chicago, while plaintiff's factory was located at Biglerville, Pa. The contract was made through F. W. Seyfarth & Company as brokers. Mr. Seyfarth, who was the broker, testified that their office was

had planned earlier that year than the year before, and stating that if interest would give reading and delivery instructions so that shipment could be made at Plainfield's convenience, it would ensure delivery at the very last service.

Later, on December 5th, Plainfield's main stating that it had arranged to determine the exact cause of the quality plainfield was then merely, stating that the reports were due pending their return Tuesday, and adding: "If you are interested in having us give you our very last quotation, it is essential that we have your shipping instructions." This letter was in reply to a letter from Plainfield, dated December 5th, concerning the weight of Plainfield's order of the 3rd, in which Plainfield stated:

"We do much as we can regard the quotation with you, we must get shipping instructions from the party to whom we re-sell these goods before we can give you shipping instructions. We will try to get shipping instructions from the party to whom we resell these goods as soon as possible and to know will forward them to you, but do not duty until we receive these shipping instructions."

November 11th, 1919, Plaintiff made such Plaintiff, stating:

"Kindly bring to the fact that we regard these orders with it a matter of definite, we could not give you definite instructions until we received the same from them, but it seems that of late we were unable to get any instructions either from the interested party of our overseas house, so we will be pleased to have you duty goods to us here.

"The is the fact that as most delivery of these goods have been made to us at our time, we are obliging under the circumstances, to ask you to ship the [illegible] to, [illegible], as slowly as we can.

"We refer you to the [illegible] Bank of the Commerce and Trust Co., Chicago.

"Should you be unable to make disposition in these terms when we had claimed it request, we will [illegible]."

The defendant's plea of [illegible] was in [illegible], while Plaintiff's factory was located at Edgewater, Va. The [illegible] was [illegible] G. E. Duffield & Company [illegible].

Mr. Duffield, who was the [illegible], testified that their office was

notified by the plaintiff that it was ready to ship the apples, and Mr. Seyfarth says that he called on defendant and tried to get instructions from him; that Mr. Dushoff replied that he had sold the contract to a firm in Buffalo and was waiting for instructions from them; that about November 20th Mr. Musselman of the plaintiff company came to Chicago; that he and Mr. Musselman went to defendant's office and took the matter up with him personally; that Mr. Dushoff said that if Musselman wanted to ship the apples he would have to ship them to Chicago on a sixty day acceptance; that Musselman replied that he would not ship the apples on a sixty day acceptance. Mr. Seyfarth further testified that they asked defendant why the concern in Buffalo would not take the apples, and that he replied that the prices had declined, and stated that he had also laid down on a lot of other contracts that he was handling.

Mr. Charles W. Budde, associated with the broker, also testified to requests made on the defendant for shipping instructions, which defendant failed to give.

The evidence was conflicting as to the fair cash market value of these apples at the time in question, but that issue of fact has been settled, we think, by the verdict of the jury in favor of plaintiff's contention. There was evidence for plaintiff tending to show that upon the failure of defendant to give shipping instructions, plaintiff sold the goods to other customers at a price 50 cents less per dozen than the contract price, and this is the amount of damages allowed by the verdict of the jury.

The defendant argues in this court that the evidence failed to show that defendant was in default on the contract. He says that it is apparent from the contract that the clause as to shipment referred only to the designation of the time of shipment; that the place to which shipment was to be made was clearly not

matters by the statement that it was really in that the agent, Mr. Ingersoll, made that in making a definitive and binding instructions from him; that Mr. Dawhoff replied that he had sold the contract to a firm in Buffalo and was waiting for instructions from them; that about seventeen days Mr. Hawkins of the plaintiff company came to Chicago; that he and Mr. Ingersoll went to defendant's office and that the matter up with the president; that Mr. Dawhoff said that if Ingersoll wanted to sell the engine he would have to sell them to Chicago or a party in Chicago; that Ingersoll replied that he had made the engine at a party for advertisement. Mr. Dawhoff further testified that that was material why the engines in Buffalo could not have the engine, and that he replied that its values had declined, and stated that he had also had here on a lot of other engines that he was holding.

Mr. Charles T. Dunne, associated with the trial, also testified to requests made on the defendant for shipping instructions, which information failed to give.

The evidence was conflicting as to the fair cash market value of these engines at the time in question, but since none of that has been selling, we think, by the verdict of the jury in favor of plaintiff's contention. There was evidence for plaintiff tending to show that upon the failure of defendant to give shipping instructions, plaintiff sold the engine to other customers at a price 50 dollars less per horse than the contract price, and this is the amount of damages claimed by the verdict of the jury.

The defendant argues in this court that the evidence failed to show that Dawhoff was in default on the contract. He says that it is uncontested from the evidence that the claims as to delayed delivery only to the development of the view of shipment; that the place to which shipment was to be made was already not

left to the convenience of the plaintiff; that the contract manifestly meant that shipment was to be made to the defendant; that the defendant, as a buyer, had neither the privilege nor the duty to give instructions as to the time of shipment, as this was wholly at the plaintiff's convenience; that since the place of shipment was Chicago, Illinois, and the time of shipment was at the convenience of the shipper, the suit is based on what he calls "much ado about nothing."

There is, however, nothing in the contract by which it could be inferred that the apples were to be shipped to Chicago. Indeed, the letter of defendant distinctly says that he has resold the goods to parties in Buffalo, New York, and is waiting shipping instructions from them. The law would not require that the plaintiff should ship the goods to Chicago in spite of a notice from defendant to the effect that he did not want them there and could not pay for them. To so construe the contract would be most unreasonable. Upon that theory, in order to establish the defendant's liability, it would have been necessary to ship the apples to Chicago, paying the freight upon them, and then resell them in order to establish a breach of contract by the defendant. The contract says nothing about the place to which the shipment should be made. It would seem that it was the intention of the parties that that matter be left open so that the defendant might be free to give instructions where the goods should be shipped. The specific provision of the contract was that plaintiff should deliver the goods f. o. b. the cars at Biglerville, Pa., and its duty would then cease, and the law did not require it to perform the useless act of shipping the goods from Biglerville to Chicago in order to establish the defendant's breach of the contract. Section 43 of the Uniform Sales Act, Cahill's Ill. Stat., p. 3043, provides:

lack in the sufficiency of his plaintiff; that the contract, unfortunately owned that subject, was in no wise by the defendant; that the defendant, as a party, had waived the privilege nor the duty to give instructions or to the time of delivery, or that was wholly at the plaintiff's convenience; that since the place of delivery was Chicago, Illinois, and the time of delivery was in the warehouse of the shipper, the suit is taken on what is called "sunk sale, shown nothing."

There is, however, nothing in the contract by which it could be inferred that the goods were to be shipped to Chicago. Indeed, the letter of defendant distinctly says that he was ready and prepared to deliver in Buffalo, New York, and is setting shipping instructions from them. The law would not require that the plaintiff would ship the goods to Chicago in spite of a notice from defendant to the effect that he did not want them there and could not accept them. To so construe the contract would be very unreasonable. Upon that theory, in order to substitute the defendant's liability, it would have been necessary to ship the goods to Chicago, paying the freight were then, and then proceed then to assert to substitute a breach of contract by the defendant. The contract says nothing about the place to which the shipment should be made. It would seem that it was the intention of the parties that that matter be left open so that the defendant might be free to give instructions where the goods should be delivered. The specific provision of the contract was that plaintiff should deliver the goods f. o. b. the cars at Edgerville, Ill., and its duty would then cease, and the law did not require it to perform the useless act of shipping the goods from Edgerville to Chicago in order to establish the defendant's breach of the contract. Section 42 of the Uniform Sales Act, Burdit's Ill. Ann., p. 3049, provides:

"Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, or usage of trade to the contrary, the place of delivery is the seller's place of business if he have one, and if not, his residence. ***"

The evidence in this case is uncontradicted that shipping instructions were requested. We think the fair construction of the contract is that the duty of giving these instructions rested upon the defendant and that by failing and refusing to do so he breached the contract.

The defendant further argues that the resale of the goods was not made in accordance with the provisions of Section 60 of the Uniform Sales Act (Cahill's Revised Stats., p. 3047), in that plaintiff did not wait a reasonable time after defendant's default. In this connection it is pointed out that no notice was given to defendant of the proposed sale. The conclusive answer to this is that the title to the goods had not passed to the vendee, and Section 60 was therefore inapplicable. On the contrary, section 64 of that Act is controlling under the facts in this case. It provides:

"Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance."

In the second paragraph of this section the measure of damages is stated to be the difference between the contract price and the market value. This rule seems to have been followed by the jury in the assessment of damages.

Substantial justice has been done and the judgment is affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

28126

391 - 28226

ARTHUR B. ARCHAMBAULT et al., etc.,
Appellees,

vs.

TOM DEMOS, JAMES FULOS and
PETER LANGAS, Copartners,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendants from a judgment in the sum of $653.38, entered upon the verdict of a jury. The plaintiffs brought suit for damages, as alleged, by reason of the breach of a contract by the terms of which plaintiffs agreed to sell and defendants to buy 192 empty whiskey barrels at the price of $8.50 each.

There is uncontradicted evidence to the effect that defendants gave an order for the barrels, which were, however, to be "satisfactory" to them; that the barrels were in a freight car, where they were examined, at least in part, on October 11, 1920, by defendant Langas, who thereafter gave two checks for the purchase price thereof, and at the same time received the bill of lading which he retained for several days; that following this partial examination defendants removed 22 of the barrels in question; that October 12th, the day following the partial examination and the giving of the checks, was a holiday; that on the following day, to-wit, the 13th of the month, defendants stopped payment on the checks.

There is evidence tending to show that defendants at first gave as a reason for stopping payment on the checks that the barrels in question were vinegar barrels, but later changed their position, claiming that the barrels were to be "fresh empties," as they are called in the trade, which it is conceded they were not. It is also established by undisputed evidence that they

were not vinegar barrels, and, further, that the defendants retained the bill of lading for something like a week after payment on the checks was stopped.

Defendants' testimony is to the effect that the agreement was to deliver fresh empty whiskey barrels, and defendant Langas testified that he was able to examine only two of the barrels prior to the giving of the checks, and that he gave the checks only upon plaintiffs' promise that the remainder of the barrels were fresh empties like the two which he examined. There was an issue of fact, however, made on this which we must regard as settled by the verdict of the jury in favor of the contention of the plaintiffs. We are not disposed to interfere with the verdict of the jury in this regard and are the more constrained to so hold by reason of the fact that it clearly appears defendant Langas did not testify truthfully in regard to his continued possession of the bill of lading. It is conceded that according to the terms of the sale it was conditional upon the barrels proving satisfactory to the defendants upon examination, and the defendants cite cases to the effect that under such a contract the purchaser has an absolute right to refuse the goods if the same are not satisfactory, even though in reason the purchaser ought to be satisfied. Goodrich v. Van Hortwick, 43 Ill. 445; Kendall v. West, 196 Ill. 225; Dvorak v. Prusha, 156 Ill. App. 514; Hoover v. Chandler, 113 Ill. App. 167. That rule of law is not in dispute here. On the contrary, the plaintiffs contend that there was in fact an acceptance of the goods by the defendants after an examination of the same. Section 48 of the Uniform Sales Act (Cahill's Statutes 1931) p. 3045, provides:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relatio

were not always honest, and, further, that the defendants should be the bait of labour for something like a weak straw-argument to the minds the charges.

Defendants' testimony is to the effect that the agreement was to neither fixed, nor strictly honest, but defendant Langer testified that he was able to explain away his or his servants prior to the giving of his orders, and that he gave the orders only upon authority provided that the measures of the Bureau were fixed against him; he was not misled. There was no issue of fact, however, such as this that at most issues as settled by the verdict of the jury in favor of the conformation of the plaintiffs. We are not disposed to interfere with the verdict of the jury in this regard and are the more convinced to be held by reason of the fact that in similar cases defendant Langer did not testify particularly in regard to the continued presence of the fill of liquor. It is conceded that according to the terms of the rule it was established upon the terms prevent evidence in the defendants upon examination, and the defendants also were in the effect that their case (Langer) (?) proceeded on strictly rules in judge the price of the beer the not relation-ship, even though in spite of the prejudice which it be satisfied. Dunlap v. The Dunlap, 16 Ill. 418; Gaylord v. Tuck, 108 Ill. 339; Jones v. Jones, 114 Ill. 8, 20; Dayton v. Dunlap, 110 Ill. App. 187. That rule of law is not in dispute. On the contrary, the plaintiffs evidence that there was in fact an agreement of the joint by the defendants after the expiration of the same. Section 48 of the Uniform Sales Act (Smith's Statutes 1921) p. 3042, provides:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation

to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

We think there is evidence from which the jury might reasonably find that defendants did accept the goods in question, and, of course, if there was an unqualified acceptance the defendants could not thereafter claim the right to rescind on account of an unreasonable dissatisfaction with the goods. We regard the retention of the bill of lading by defendants as significant; very much so in view of the fact that defendants seem to have bought on a falling market.

The judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and Johnston, J., concur.

19½ - 27786

WILLIAM F. KELLY, doing business as W. F. Kelly Teaming Company, Appellee,	APPEAL FROM
vs.	SUPERIOR COURT,
COMMONWEALTH EDISON COMPANY et al.,	COOK COUNTY.
ON APPEAL OF BEAVER ELECTRIC CONSTRUCTION COMPANY, a corporation, Appellant.	

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This suit for damages for the death of Abraham Gamer was brought by his employer, William F. Kelly, under the first paragraph of section 29 of the Workmen's Compensation Act, against appellant company. All parties were bound by the Compensation Act. An award was entered by the industrial commission in arbitration proceedings brought by the Standard Trust & Savings Bank, administrator of the estate of the deceased, against Kelly, requiring the latter to pay a total of $4,000 in installments as provided in said award. The verdict of the jury was for said sum, and judgment was entered thereon.

The declaration alleges that said Gamer left him surviving Lena Gamer, his wife, Jacob H. Gamer, his son, age ten years, and Dorothy Gamer, his daughter, age six years, as his only heirs at law and next of kin, and that they are still surviving, and in consequence of the death of the said deceased his said widow and children have been deprived of large sums of money and valuable services which the said deceased in h is lifetime was accustomed to contribute and

perform for them.

"It is the settled law that the fact of survivorship of a widow or next of kin is an essential element to the cause of action, and it is therefore indispensable that it should be alleged and proved." (Lake Shore & Michigan Southern Ry. Co. v. Hessions, 150 Ill. 546; Foster v. St. Luke's Hospital, 191 id. 94.) The record in this case discloses no proof of these allegations. Plaintiff called the administrator's secretary to prove the amount of money that had been paid to the administrator under said award. Among other questions put to him were these: "And the Standard Trust & Savings Bank being administrator of the estate of Abraham Gamer, is it in your department that the matters are taken care of, and the compensation paid by the Kelly Teaming Company to the bank, and given to the widow, come under your department?" The answer was: "It does." After asking how much money had been paid in, counsel put this question: "And that has been divided up by you into funds for the widow and attorney's fees in other proceedings, arbitration proceedings and other matters?" The answer was: "The court costs, yes."

Appellee relies upon these questions and answers and the inferences that may be drawn therefrom as constituting prima facie proof of the survivorship of a widow. We cannot so regard it. The burden was upon plaintiff to prove these essential elements to the cause of action.

But even if we might infer from such evidence that deceased left a widow, there was no proof that she was alive, so as to entitle plaintiff to maintain this action, nor proof of damages. While the award was offered in evidence it was relevant only as fixing the limit of any recovery plaintiff might be entitled to. It did not of itself constitute proof of damages. (Taylorville v. Illinois Public Service Co., 301

perform for them.

"It is the settled law that the fact of survivorship of a widow or next of kin is an essential element in the cause of action, and it is therefore indispensable that it should be alleged and proved." (Lake Shore & Michigan Southern Ry. Co. v. Brewster, 2 Ohio Cir. Ct. 111, 114; Tanner v. St. Louis Public Schools, 193 Ill. 94.) The record in this case discloses no proof of these allegations. Plaintiff called the administrator's secretary to prove the amount of money that had been paid to the criminal trustee under such award. Among other questions put to him were these: "Was the Atlantic Trust & Savings Bank being administrator of the estate of Patrick Conner, is it in your experience that the matters are taken care of, and the compensation paid by the Bailey Trading Company to the trust, and given to the widow, some months past afterwards?" The answer was: "It does." After making how much money had been paid in, counsel put this question: "And that has been divided up by you into funds for the widow and children's free in other proceedings, attorneys' fees and other matters?" The answer was: "We did not do." Counsel for police made these questions and answers and the inferences that may be drawn therefrom as constituting prima facie proof of the survivorship of a widow. We cannot so regard it. The burden was upon plaintiff to prove these essential elements to the cause of action.

But even if we might infer from such evidence that deceased left a widow, there was no proof that she was living, so as to entitle plaintiff to maintain this action, nor proof of damage. While the court was offered in evidence it was relevant only as fixing the limit of any recovery plaintiff might be entitled to. It did not of itself constitute proof of damage. (Jacksonville v. Illinois Bell Telephone Co., 301

Ill. 157, 162.)

As the judgment must be reversed for failure to prove said essential elements to the cause of action we need not discuss the facts. The cause, however, will be remanded for a new trial.

Respecting other assignments of error it is enough to say that we think plaintiff made out a prima facie case that the deceased came to his death through the negligence of defendant, and that there was sufficient evidence for the jury to reach the conclusion that the deceased was not guilty of contributory negligence. Nor can we say there was reversible error in the court's rulings upon the evidence or upon instructions given or refused. As the case must be retried it would serve no useful purpose to discuss points made on these assignments.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

Ill. 197, 198.)

In the judgment must be reversed for failure to prove said essential elements in the cause of action as most favorably the facts. The cause, however, will be remanded for a new trial.

Recognizing other instances of error it is enough to say that we think plaintiff made out a prima facie case that the deceased came to his death through the negligence of defendant, and that there was sufficient evidence for the jury to reach the conclusion that the deceased was not guilty of contributory negligence. Nor can we say there was a reasonable error in the court's refusal upon the evidence to give instructions given by defendant. In the case most favorable it would seem the verdict warrant in finding defendant guilty as charged.

Affirmed and remanded.

Barnett and Niles, JJ., concur.

107 - 27939

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

WILLIAM F. QUESSE et al.,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiffs in error were tried upon an indictment containing twelve counts, the last two of which were dismissed, charging them with an unlawful conspiracy. There was a separate verdict as to each defendant, finding him "guilty of conspiracy in manner and form as charged in the seventh count or counts of the indictment" and fixing his punishment at imprisonment in the penitentiary.

Only the common law record is brought before us on this writ, and the assignments of error relate only thereto.

The points urged are (1) that the seventh count of the indictment is insufficient to sustain the verdict; (2) that the verdict is too uncertain to sustain the judgment; (3) that counts seven and eight are identical in legal effect, and the failure to make a specific finding upon the latter is tantamount to a finding of not guilty as to both; (4) that the jury were required by law to fix a definite sentence. It having been conceded at the time of the oral argument that the Supreme Court has held adversely to the last contention in People v. Graves, 304 Ill. 20, and People v. Lloyd, 304 Ill. 23, that point need not be discussed.

The seventh count charged in substance that divers

large numbers of persons owned apartment buildings and apartment hotels in Chicago, and in the operation and management of the same for their tenants it was necessary to employ janitors, and that defendants, knowing these facts and intending to extort large sums of money from said owners, unlawfully conspired, with intent to induce and prevent janitors in their employ or about to become so from working for them, to boycott said owners and thereby to prevent, hinder and embarrass them in leasing their apartments, and to prevent the furnishing of services to the various tenants in said buildings, unless said owners would pay defendants large sums of money, and in furtherance of said conspiracy did unlawfully, etc., extort, obtain and procure from them large sums of money, contrary to law, etc.

The eighth count differs from the seventh mainly in alleging the conspiracy was directed against and the money extorted from certain designated individuals.

The counts, therefore, are not identical. Proof that would support the eighth would not necessarily support the seventh and vice versa. Hence the third contention above stated is not well founded.

It will be unnecessary to set forth the other counts for they have no special bearing on the questions before us, the verdict being referable, in our opinion, to the seventh count only.

The assigned errors rest upon the refusal of the court to quash the indictment and to arrest judgment. The judgment adjudged each defendant separately "guilty of said crime in manner and form as charged in the seventh count upon the indictment in this cause and the said verdict of guilty," and each was sentenced to the penitentiary.

large numbers of persons owing allegiance and obedience
India in Ceylon, and in the acquisition and maintenance of the
the-Gulf issue is not necessary to modify Indians, and that
Afghanistan, together these facts are intended to assist large
mass of money from not secure, unauthorizing complicated, with issues
to Indians and overseas journeys in their money or about to become
an item working for them, to deposit only owners and thereby in
greater, minor and adequate than in limited their governments,
and to prevent the functioning of services in the various towns
to make building, waters and owners would any increases large
mass of money, and in furthermore of will concerning all ma-
terials, etc., money, which not prevent that this large sum
of money, statutory failed, etc.

The courts would differs from the events making in
adopted the authorities was directed another and the money amounts
fundamentally designated individuals.

The remedy, therefore, was not sufficient. Proof that
would benefit the people would not immediately secured the events
and also years. Hence the total authorities where trying to not
will fraudulent.

It will be necessary to see that the other groups
for they have no needed benefit on the question before us, the
regular being relevant, in our opinion, to the groups under
only.

The material effects had upon the relatives of the
court to grant the indictment and to arrest delinquent. The delin-
quent obtained such derivative expressly "going of such sums in
manner and free as charges in the accounts count upon the indict-
ment in this case but the self period of valid," but also had
convicted in the penitentiary.

It is urged that the seventh count was insufficient in law because it did not name the persons against whom the conspiracy was directed, or state that they were unknown to the grand jury, and that it charges an "extortion" and not an unlawful conspiracy. To the first contention it is sufficient to say that where a conspiracy is directed against a class it is unnecessary to name in the indictment the individuals who compose it, and in answer to the second point that the indictment does not purport to be for the statutory offense of extortion by threats. The allegations in this count plainly import a conspiracy against a class described as owners of apartment buildings and apartment hotels leased for dwellings, in the maintenance and operation of which it is necessary to employ janitors. It charges a conspiracy to boycott a class by such description, as may properly be done. (Lowell v. People, 239 Ill. 327, 336; Johnson v. People, 194 Ill. App. 213; People v. Smith, 239 Ill. 91, 98.)

In this connection it is urged that because in certain parts of the count the owners are referred to as "divers individuals" or "divers large numbers of individuals" the count cannot be construed as directed against a class. A similar criticism was held not good in Collins v. Commonwealth, 3 Sargeant & Rawles (Pa.) 220, where the indictment charged a conspiracy to deceive and defraud "divers citizens," and in Queen v. Peck, 36 Eng. Law Rep. 362, where the indictment charged a conspiracy "to defraud divers of her Majesty's subjects." In the latter case the court said: "We are of the opinion that there is nothing in this. If the offense went no further than the general conspiracy, it would not be known what particular persons would fall into its snare." To a similar objection made in McKee v. State, 111 Ind. 378, it was said that "The authorities have abundantly settled the proposition that an indict-

It is urged that the servants acted with insufficient in law because it did not limit the persons against whom the conspiracy was directed, or allege that they were unknown to the grand jury, and that it charges no "substrictum" and not an unlawful association. In the first connection it is sufficient to say that where a conspiracy to directed against a class it is unnecessary to name in the indictment the individuals who compose it, and in answer to the second point that the indictment does not contain to be due the statutory citizens of Kentucky in consists. The allegation in this count clearly imports a conspiracy against a class described as persons of negroes including not accordance which based for Kentucky, in the constitution not equality of which it is necessary to which indictment. It charges a conspiracy to deprive a class of such description, we may properly so describe. (Ibid.) v. Jones, 99 Fed. 877, 880; Johnson v. Jones, 104 Fed. 449, 451; Jones v. Smith, 99 Fed. 451.

In this connection it is urged that Section 5 prohibit acts of the group the crime can referred to as "direct interference" or "direct injury another of individuals" the court cannot be authorized to direct against a class. A similar criticism was held not part in Guinn v. Commonwealth, 7 Ky.Law R 1 Bennet (1-1 ed), where the indictment charged a conspiracy to hinder and deprived "divers citizens." but in Ingram v. Ibid. 24 Ky. Law Rep. 827, where the indictment charged a conspiracy "to interfere divers of the Baptist's members." In the latter case the court said: "We are of the opinion that there is nothing in this. If the offense was in further that the general conspiracy, it could not be known that particular persons would fall into its snare." In a similar indictment in Bohon v. State, 111 Ind. 479, it was held that "The multitude have absolutely rejected the proposition that an indict-

ment is not bad which charges that the object of a conspiracy is to defraud many persons not capable of being resolved into individuals," and construed the word "divers" as synonymous with "many" in that case. It must be recognized, too, as a matter within common knowledge, that owners of such buildings in Chicago are so numerous it would be impracticable if not impossible to give all their names. (Lowell v. People, supra.)

Nor can it be properly questioned that the object of the conspiracy constitutes an unlawful act. The object named is to boycott the owners of said buildings. The term "boycott" has a well defined meaning and is declared to be unlawful in this State. (Doremus v. Hennessy, 176 Ill. 608; Carlson v. Carpenters Contractors' Assn., 308 Ill. 351.) And it is also settled law in this State that the unlawful act which may become the object of a conspiracy need not be an indictable offense. (Smith v. People, 26 Ill. 9; Chicago, Wilmington & Vermilion Coal Co. v. People, 214 Ill. 435; People v. Curran, 286 Ill. 302.) It is unnecessary to discuss the allegations respecting the particular results of the alleged boycott. They simply serve to state its harmful effects and to disclose its unlawful character. It is conceded that if the indictment charges a conspiracy to boycott, it charges a criminal offense.

While extortion, in the sense of the common use of that word, is alleged to be the ultimate purpose of the conspiracy, and it is alleged that money was extorted and obtained in furtherance thereof, yet the averments of such purpose and of the overt act do not change the character of the crime charged, the gist of which is a conspiracy to boycott. An overt act not being necessary to constitute the crime of conspiracy, the alleging of it is an unnecessary allegation that may be rejected as surplusage. (People v. Darr, 255 Ill. 456.)

But so far as can be determined from the record, the

mord is not bad which charges that the object of a conspiracy is to defraud some person out somewhat of being received into divinity," and construed the word "divers" as synonymous with "many" in that case. It must be recognized, too, as a matter of common knowledge, that owners of such buildings in Chicago are so numerous it would be impossible or not impossible to give all their owners. (Lowell v. Ziegler, supra.)

How can it be seriously contended that the object of the gambling conspirators in question was, the object aimed at to depend the owners of all buildings. The word "depend" has a well defined meaning and is defined to be unlawful in this State. (Jackson v. Commonw., 97a Ill. 209; Sullivan v. Corporation Counsel, 200 Ill. 5[illegible]; and it is also settled law in this state that the unlawful act which may become the subject of a conspiracy must be of a criminal character. (Smith v. Smith, 85 Ill. 8; Johnson Wildberger & Westphalen Lumb. Co. v. Sturgis, 34 Ill. 488; Smith v. Barker, 66 Ill. 305.) It is unnecessary to discuss the allegations relating the particular results of the alleged conspiracy. They simply serve to state the mental effects and to claim the unlawful character. It is admitted that if the indictment charged a conspiracy to depend, it charges a criminal offense.

While admitting, in the view of the common law of that land, it aimed to be the criminal purpose of the conspiracy, and it is alleged that money was exacted and obtained in furtherance thereof, yet the averments of such purpose and of the overt act is not change the character of the crime charged, the gist of which is a conspiracy to depend. An overt act not being necessary to constitute the crime of conspiracy, the allegedly of it is an unnecessary allegation that may be rejected as surplusage. (Pennie v. State, 2[illegible] Ill. 185.)

But so far as can be determined from the record, the

motion to quash was general, and did not point to any particular thing in which the indictment is claimed to be defective. In that form the motion would meet only defects in substance. (People v. Munday, 293 Ill., 191, 194.) We do not think the indictment was defective in substance. Hence the court did not err in refusing to quash the indictment.

Nor do we concur in the contention that the verdict was too indefinite or uncertain to support the judgment.

It is the tendency of modern decisions to sustain the verdict where the intention of the jury can be ascertained. (Stoltz v. People, 4 Scam. 168; Lyons v. People, 68 Ill. 271.) It is a well established doctrine that a verdict is not to be construed with the same strictness as an indictment, but will be liberally construed with all reasonable intendments indulged in its support; and it will not be held insufficient unless from necessity there is doubt as to its meaning. (People v. Lee, 237 Ill. 272; People v. Tierney, 250 id. 515; People v. Brown, 273 id. 169; People v. Patrick, 277 id. 10; People v. Buckman, 279 id. 348.) This principle was applied in the last cited cases, in each of which the verdict was challenged for informality or on technical grounds. Observing the general rule in this respect, we think it is evident that whether the jury intended to find defendants guilty on any other count it is reasonably certain that they intended to find them guilty under the seventh count of the indictment, as to which there is no uncertainty in the finding; and if they so intended, we think the verdict was sufficient to support the judgment entered on that count whether the jury sought to have it cover any other count or not. Whatever doubt adheres to the use of the words "or counts," it was resolved in favor of defendants, for the judgment was entered only

notice to which was general, and did not point to any particular ruling in which the indictment is claimed to be defective. In that form the motion would rest only defects in substance. (Florida v. Kelly, 90 Fla., 191, 194.) We do not think the indictment was defective in substance. Thus the court did not err in refusing to quash the indictment.

Nor do we concur in the contention that the verdict was too indefinite or uncertain to support the judgment.

It is the tendency of modern decisions to restrain the rigidity where the intention of the jury can be ascertained. (Wallace v. Florida, 4 Dem. 1.86; Lyons v. Florida, 2a Fla. 171.) It is a well established doctrine that a verdict is not to be construed with the same strictness as an indictment, but will be liberally construed with all reasonable intendments favoring its sufficiency; and it will not be held insufficient unless from necessity there is doubt as to its meaning. (Florida v. Lee, 57 Fla. 177; Florida v. Plummer, 90 Id. 9.8; Florida v. Green, 89 Id. 7.6; Florida v. Pickard, 97 Id. 3.; Florida v. Jackson, 97 Id. 7.8.) This principle was applied in the last cited cases, in each of which the verdict was challenged for intermediate or immaterial remarks. Observing the general rule in this respect, we think it is evident that whether the jury intended to find defendants guilty in any other event it is reasonably certain that they intended to find them guilty under the circumstances of the indictment, as to which there is no uncertainty in the finding; and if they so intended, we think the verdict was sufficient to support the judgment entered on that count. Whether the jury sought to have it apply any other count or not, "indirect doubt adhered to the use of the words "or counts," it was resolved in favor of defendants, for the judgment was entered only

on the specific finding on the seventh count. The judgment, therefore, as well as the failure of the jury to find defendants guilty upon any other specific count, was tantamount to an acquittal on all other counts than the one specified. If the words "or counts" operated to acquit defendants on all other counts than the seventh, then they have no ground for complaint unless it can be said that such words rendered uncertain the specific finding on the seventh count. (Chambers v. People, 4 Scam. 351.) The finding on the seventh count is positive and unequivocal, and we are of the opinion that it is not made any the less so by the additional words which can only be construed as referring to the other counts, upon which defendants stand acquitted.

Cases cited by plaintiffs in error where there was a finding of guilty on one count and of not guilty on a like count, or where the court could on conviction under several counts impose a separate penalty on each, or where there was a finding on less than all the counts without specifying which, are not in point. In the absence of a bill of exceptions, we must presume that the finding of guilty on the seventh count was fully supported by the evidence, and in such a case it ought not to be defeated by an informality or technicality unless it is one that necessarily vitiates the entire verdict, and we do not think the defect is one of that character.

Nor does the record disclose that any objection was made to the form or sufficiency of the verdict when returned, and under the general rule any objection that could have been made to a mere defective finding is waived and cannot be urged for the first time on review. (3 Corpus Juris, p. 865.)

Accordingly we think the judgment, which rests entirely upon the seventh count and which had the effect to acquit the defendants on all other counts, should be affirmed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

on the specific finding on the seventh count. The judgment, however, as well as the failure of the jury to find defendants guilty upon any other specific count, was insufficient to be sustained on all other counts than the one specified. If the words "or counts" rendered to result determinate on all other counts than the seventh, then they have no ground for complaint unless it can be said that such verdict rendered uncertain the specific finding on the seventh count. (Gardner v. People, 4 Scam. 83.) The finding on the seventh count is positive and unequivocal, and we are of the opinion that it is not made any less so by the additional words which can only be construed as referring to the other counts, upon which defendants stand acquitted.

Cases cited by plaintiffs in error where there was a finding of guilty on one count and of not guilty on a like count, or where the court could on conviction under several counts impose a separate penalty on each, or where there was a finding on less than all the counts without specifying which, are not in point. In the absence of a bill of exceptions, we must presume that the finding of guilty on the seventh count was fully supported by the evidence, and in such a case it ought not to be defeated by an informality or inconsistency unless it is one that necessarily vitiates the entire verdict, and we do not think the defect in the of that character.

Nor does the record disclose that any objection was made to the form or sufficiency of the verdict when received, and under the general rule any objection that could have been made to a mere defective finding is waived and cannot be urged for the first time on review. (2 Bishop Crim. P. 888.)

Accordingly we think the judgment, which rests entirely upon the seventh count and which had the effect to acquit the defendants on all other counts, should be affirmed.

AFFIRMED.

Crailey and Zick, JJ., concur.

353 - 28188

WILLIAM LOEHDE, Appellee,	)	APPEAL FROM
	)	MUNICIPAL COURT
vs.	)	OF CHICAGO.
ANNA STRAUSS, Appellant.	)	

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover real estate commissions in which there was a judgment for $750 for the plaintiff. It was begun in the name of William H. Loehde and the pleadings and record were subsequently amended to read William Loehde instead of William H. Loehde. The latter is the son of the former. The son testified that they are partners and have been associated in business for twenty-one years. The father testified that he was instrumental in procuring the agency to sell the property, and that all he did in the matter was to have it listed on the books and to turn the matter over to his son, who conducted all the negotiations for its sale.

The evidence is very close on the main issue whether there was a contract of agency. If there was one, according to the testimony of the son, it was a contract with a partnership and not with the plaintiff alone. Even if we were to hold that the evidence was sufficient to sustain the claim made that there was a contract of agency and that a prospective purchaser was procured who was ready, willing and able to purchase the property on defendant's terms, yet the judgment cannot stand in view of the fact that the suit was brought in the name of only one of the partners.

Accordingly the judgment must be reversed and the cause

AAA - 2046

[illegible]

[illegible]

[illegible],	[illegible]
vs.	MUNICIPAL COURT
[illegible],	OF [illegible].
[illegible].	

[illegible]

[illegible]. [illegible]

REALIZING THE DUTIES OF THE COURT,

This is a suit to recover real estate commissions in which there was a judgment for $[illegible] for the plaintiff. It was begun in the name of William H. Lockhy and the pleadings and [illegible] were subsequently amended to [illegible] William Lockhy instead of William H. Lockhy. The latter is the son of the former. The son testified that they are partners and have been associated in business for twenty-two years. The father testified that he was instrumental in procuring the agency to sell the property, and that all he did in the matter was to have it listed on the books and to turn the matter over to his son, who undertook all the negotiations for the sale.

The evidence is very clear on the main issue whether there was a contract of agency. If there was one, according to the testimony of the son, it was a contract with a partnership and not with the plaintiff alone. Even if we were to hold that the evidence was sufficient to sustain the claim made that there was a contract of agency and that a prospective purchaser was procured who was ready, willing and able to purchase the property on defendants terms, yet the judgment cannot stand in view of the fact that the suit was brought in the name of only one of the partners.

Accordingly the judgment must be reversed and the cause

remanded, the court having erred in not arresting the judgment.

REVERSED AND REMANDED.

Gridley and Fitch, JJ., concur.

398 - 28233

SIMON HOLMES,
Appellee,

vs.

CHARLES E. FRAZIER et al.,
Civil Service Commissioners,
et al.,
Appellants.

APPEAL FROM CIRCUIT COURT OF
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from an order quashing the record of the proceedings of the Civil Service Commission of the City of Chicago as shown by its return to a writ of certiorari sued out by appellee, who held the position of sergeant of police of said city under the Civil Service law, and was ordered removed therefrom as the result of a trial before said commission.

The return sets forth the nature of the charges preferred against him, that a hearing was had on due notice thereof, and that there was a finding against him of "guilty of incapacity or inefficiency in the service," and that he was ordered discharged from the service. The return does not contain the evidence taken or the substance thereof or a finding of any fact it tended to prove. In this respect it is like the record in Funkhouser v. Coffin, decided by this court (221 Ill. App. 14) and affirmed in the Supreme Court. (301 Ill. 257.) As the opinions in that case contain a full discussion of the law pertaining to a proceeding of this character, there is no call for our elaboration upon the principles involved. It was there held that as section 12 of the Civil Service Act forbids the exercise of the power of removal by said commission "except for cause," and as nothing is taken by intendment in favor of the jurisdiction of such inferior tribunal,

[illegible],
Appellee,

vs.

[illegible] R. Hawkins et al.,
Civil Service Commissioners,
et al.,
Appellants.

[illegible] Court of Appeals
[illegible]

[illegible]

II. Prohibited Political Labors

Soliciting the Contents of the Ballot.

This appeal is from an order quashing the return of the peremptory of the Civil Service Commission of the City of Chicago as shown by its return in a writ of mandamus sued out by appellee, who held the position of sergeant of police or patrolman under the Civil Service law, and was removed contrary to the result of a trial before said commission.

The return sets forth the charge of the chargen preferred against him, that a hearing was had on the charges thereof, and that there was a finding against him of "going of incompetently or inefficiently in the service," and that he was removed directly from the service. The return does not contain the evidence taken or the substance thereof or a finding of any fact in issue as proven. In this respect it is like the record in [illegible] v. Duffin, decided by this court (231 Ill. App. 14) and affirmed in the Supreme Court. (283 Ill. 287.) In the opinion in that case contain a full discussion of the law pertaining to a proceeding of this character. There is no call for our elaboration upon the principles involved. It was there held that as section 12 of the Civil Service Act forbids the exercise of the power of removal by said commission "except for cause," and as nothing is taken by intendment in favor of the jurisdiction of such inferior tribunal,

the cause for removal must be made to appear by a recital of such facts, or the evidence of them, as may be necessary to determine whether it existed, and a finding of "guilty as charged" is a mere conclusion of law and not a recital of facts. The finding here is to the same effect, a mere conclusion without a statement of fact from which the court is able to see that it was true.

Because the return fails to show any fact from which the commission deduced its conclusion, the proceedings were properly quashed.

AFFIRMED.

Gridley and Fitch, JJ., concur.

The method for ensuring such an idea is unique to a reality is just that, or the existence of idea, is not dependent to independent objects is erroneous, not a figure of "quality" as changing is a mere "possibility" of the real of truth. The finding idea is to the user effect, a new constitution thinking a disorder of that idea which the model is also to see that it was idea.

Because the values that's is more as just free which the association defined the conclusion, the presentation that provide question.

Antinomy.

Antinomy and Kind, 1.. source.

G225a

28337

HARRY DAVIS,
Appellee,

vs.

AETNA LIFE INSURANCE COMPANY, a corporation, et al.,

ON APPEAL OF T. J. HOUSTON,
Appellant.

INTERLOCUTORY
APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit in equity, and the pleadings, proceedings and orders therein and parties thereto, except the complainant, are identically the same as in case 28336, Leroy Burton v. the same parties. Each case comes before us on an appeal by T. J. Houston, State Superintendent of Insurance, from the refusal of the court to dissolve a temporary injunction restraining him from "unlawfully" threatening any insurance company with revocation of its license to do business in this State as a penalty for its accepting business from complainant, and from doing or threatening to do any "unlawful" act interfering or tending to interfere with his business.

The case, therefore, involves the same questions presented and considered in the latter case, in which we have this day filed an opinion reversing the injunctional order so far as it relates to appellant. Therefore what was said in that case is applicable to this, and we shall merely refer to that opinion for a statement of the reasons for entering a like order of reversal in this case.

REVERSED.

Gridley and Fitch, JJ., concur.

28338

JACOB C. PUNCH and SAMUEL C. PUNCH, Appellees,	
vs.	INTERLOCUTORY APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
AETNA LIFE INSURANCE COMPANY, a corporation, et al.,	
ON APPEAL OF T. J. HOUSTON, Appellant.	

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit in equity, and the pleadings, proceedings and orders therein and parties thereto, except the complainant, are identically the same as in case 28336, Leroy Burton v. the same parties. Each case comes before us on appeal by T. J. Houston, State Superintendent of Insurance, from the refusal of the court to dissolve a temporary injunction restraining him from "unlawfully" threatening any insurance company with revocation of its license to do business in this state as a penalty for its accepting business from complainant, and from doing or threatening to do any "unlawful" act interfering or tending to interfere with his business.

The case, therefore, involves the same questions presented and considered in the latter case, in which we have this day filed an opinion reversing the injunctional order so far as it relates to appellant. Therefore what was said in that case is applicable to this, and we shall merely refer to that opinion for a statement of the reasons for entering a like order of reversal in this case.

REVERSED.

Gridley and Fitch, JJ., concur.

[illegible]

PAUL C. [illegible] and [illegible] C. [illegible],
Appellees,

vs.

ANITA LEE [illegible] PRODUCT, a
[illegible], et al.,

Defendants.

[illegible]

INTERLOCUTORY
APPEAL FROM
DISTRICT COURT OF
[illegible] COUNTY.

[illegible]

MR. MCCORMICK DELIVERED OPINION

PLAINTIFFS CAN RECOVER IF THE COURT.

This is a suit in equity, and the pleadings, proceedings and answer therein and written therein, except the appellees, are identically the same as in case [illegible], Lucy Parker v. The same appellee. Both suit cases before us on appeal by T. L. Hutton, that individualized at Immerson, from the rulings of the court in sustaining a temporary injunction restraining him from "unfairly" interfering improperly with revocation of his license to do business in this state as a penalty for his wrongfully inducing from complaint, and from doing or threatening to do any "unlawful" act interfering or tending to interfere with his business.

The case, therefore, involves the same questions presented and considered in the latter case, to which we have made our final on opinion reversing the injunctional order as for an [illegible] to appellant. Therefore when we make to that case is applicable to this, we shall merely refer to that opinion for a statement of the reasons for sustaining a like order as rendered in this case.

[illegible]

Dissenting [illegible] JJ., [illegible].

331 - 28166

McNEIL & HIGGINS COMPANY, a Corporation, Appellee, vs. CORBIN FLOUR COMPANY, a Corporation, Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In the Circuit court, upon a jury trial, appellee recovered judgment against appellant for $2,000 for damages for an alleged breach of warranty of quality in the sale of 1405 barrels of flour. On this appeal numerous errors are assigned. Two of these, in our opinion, are well assigned. The rest are not.

In March and April, 1919, appellant sold to appellee four lots of flour in barrels. There was a separate contract for each lot. The first contract called for 205 barrels of "New Jute Straight Flour, Like Sample;" the second called for 400 barrels of "Straight Clear New Jutes, Like Sample;" the third for 500 barrels of "First Clear Minnesota, Like Sample," and the fourth for 300 barrels of "Choice Clear." Each contract stated the price and terms of sale, with the added memorandum: "Less ½ Inspection," and each contained the following printed clause: "Seller guarantees buyer that said merchandise will be satisfactory to McNeil & Higgins Company."

Under these contracts shipments were made to appellee during April and May, 1919, and the flour, in barrels, was placed by appellee in its warehouse in Chicago. There is no direct proof that it was inspected by anyone or that the three lots which were

to be "Like Sample" did or did not correspond in quality with such samples. During the following six months about half of the flour so received and stored by appellee was sold by it to its customers. In November or December, 1919, some of the flour thus sold was returned by a customer who claimed it was not up to grade. Thereupon appellee had samples taken from what was left of the flour in the warehouse and had chemical tests or analyses made of these samples. The tests showed the samples to be of an inferior grade known as "second clear," which was worth in the market considerably less than the price paid by appellee. Thereupon Mr. McClasson, the vice-president of appellee, wrote several letters to appellant requesting payment of the difference between the value of the flour as ordered and the value of the flour delivered, amounting to several thousand dollars.

It was shown upon the trial that these four contracts were negotiated on behalf of appellee by one Gasner, who was then appellee's flour buyer, and on behalf of appellant by one Clarkson, its vice-president. Gasner and Clarkson were friends. Gasner left the employment of appellee in November, 1919, before any complaints as to the quality of the flour had been received.

After the foregoing facts were shown by appellee, the witness McClasson was asked by appellee's counsel to "state whatever else was written, if anything," in his letters to appellant. In reply to this question the witness related at length a conversation that he said took place between him and Mr. Corbin, the president of the appellant corporation, some time in January, 1920. McClasson testified that in this conversation he told Corbin that:

> "It looks like, since Gasner has left us, that there has been some crooked work going on. Now, I don't like to accuse anybody of anything that is not right. * * * I have the evidence, Mr. Corbin, that you have been influencing our department buyer, Mr. Gasner. Your contract calls for a certain grade of flour and you have delivered a lower grade, and have charged us for

to be "like samples" did or did not correspond in quality with such samples. During the following six months about half of the flour so received and stored by objector was sold by it at its warehouse. In November or December, 1918, some of the flour thus sold was returned by a purchaser who claimed it was not up to grade. Thereupon objector had samples taken from what was left of the flour in the warehouse and had chemical tests or analyses made of these samples. The tests showed the samples to be of an inferior grade known as "second clear," which was worth in the market considerably less than the price paid by appellee. Thereupon Mr. Goldsmith, the vice-president of appellee, wrote several letters to appellant requesting payment of the difference between the value of the flour as ordered and the value of the flour delivered, amounting to several thousand dollars.

It was shown upon the trial that these four conferences were negotiated on behalf of appellee by one Gaynor, who was then appellee's flour buyer, and on behalf of appellant by one Clarkson, its vice-president. Gaynor and Clarkson are friends. Under left the employment of appellee in November, 1918, before any complaints as to the quality of the flour had been received.

After the foregoing facts were shown by appellee, the witness Goldsmith was asked by appellee's counsel to state what else was written, if anything, in the letters to appellant. In reply to this question the witness related at length a conversation that he said took place between Mr. Gaynor, the president of the appellant corporation, then Mr. Clarkson, and himself. Objection testified that in this conversation he told Gaynor that:

"It looks like, sir, you people have left us, but there has been some trouble with the flour, Mr. Gaynor, I don't like to argue anybody of anything that is not right. * * * I have the evidence, Mr. Gaynor, that you have been fulfillmeding my department buyer, Mr. Gaynor. Your commitment calls for a certain grade of flour and you have delivered a lower grade, and have charged us for

the higher grade. Now, Mr. Corbin, that is just a common fraud, and you know you are subject to being indicted as a conspirator to defraud this corporation, and I am going to take it up with the state's attorney * * * and see whether a concern like yours can influence department buyers of a corporation like this and get money from us the way you have apparently done in this instance. If this is so, you are nothing but a cheat."

To which Corbin replied:

"I have been sick and don't know what Mr. Clarkson has done. He was the man that made all these sales to Mr. Gasner."

Whereupon McGlasson said he told Corbin:

"Well, I was told that Clarkson and Gasner had been often seen out to lunch and to dinner, and that is a peculiar way of influencing buyers. * * * You know it is against the rule for a broker to influence a buyer by giving him a present or taking him out and wining him and dining him. We couldn't stand for that. That is one reason why Mr. Gasner lost his job. You know, Mr. Corbin, that there was a revenue man over here the other day and asked for these statements, bills and contracts, and I gave them to him. He told me that you had been doing some things that the government did not approve of, and the chances are that the government is going to indict you. * * * We have got the evidence on you and you had better restore the money that has been wrongfully taken from this corporation."

To which Corbin replied:

"Well, let the matter rest for a day or two and I will see my lawyer and take it up with you again."

A motion to exclude all the above quoted testimony was overruled and exception taken.

The giving of this testimony was highly prejudicial. It was error to admit it and it was error to refuse the motion to exclude it. That McGlasson ever threatened Corbin in the manner stated was flatly denied by Corbin, and whether true or not, the alleged conversation had no tendency to prove any issue in the case. The action is not an action in tort for fraud and deceit, but an action in assumpsit. Even if the action was in tort, the testimony was, at best, only hearsay evidence of facts not otherwise proven. It was not even responsive to the question put to the witness. Its effect was to improperly place before the jury McGlasson's conclusions or opinion that the transactions in

the future years. Now, Mr. Martin, that is just a sample [illegible], and you know you are subject to being confronted at a moment's notice by different drug manufacturers, and I am going to take it up with the state's attorney. * * * all are equally a [illegible] like this and get money from us the way you have apparently done in this instance. If this is so, you are getting [illegible] about.'

To which Martin replied:

"I have been nice and don't have what Mr. Clarence has done. Do you like our drug week all those years to Mr. Deeny."

Continuing testimony said he told Martin:

"Well, I am tell that Clarkson and Company had been after me and so dirty, and that is a terrible way of [illegible] Deeny. * * * You know it is against the law for a worker to [illegible] a lawyer by giving him a percent of [illegible] the suit and winning the case against him. We don't [illegible] that. That is the reason why Mr. Deeney lost his job. The Deeny, Mr. Jacobin, that Deeny was a [illegible] man over [illegible] about the [illegible] Tillis and [illegible] and I gave them the [illegible]. Mr. Tillis or [illegible] [illegible] [illegible] Martin testified [illegible] the government did not [illegible], and the [illegible] the government is going to indict [illegible]. * * * [illegible] get evidence on you and Deeney and Mr. Martin [illegible] [illegible] [illegible] from this [illegible]."

To which Martin replied:

"Well, let the matter rest for a day or two and I will see my lawyer and take it up with you again."

A motion to exclude all the above quoted testimony was overruled and exception taken.

The giving of this testimony was highly prejudicial. It was error to admit it and it was error to refuse the motion to exclude it. That Williamson ever threatened Corbin in the manner stated was flatly denied by Corbin, and whether true or not, the alleged conversation had no tendency to prove any issue in the case. The motion is not an action in bar tort trend and doesn't but an action in assumpsit. Even if the action was in tort, the testimony was, at best, only merely evidence of fraud [illegible] wise proven. It was not even responsive to the question put to the witness. Its effect was so injuriously [illegible] before the jury Williamson's assertions or opinion that the transactions in

question were so "crooked" as to require the attention of the state's attorney and the revenue officers of the government. In view of the fact that Gasner, Clarkson and Corbin were all called later as witnesses in behalf of appellant, McGlasson's statement would tend to affect the credibility of such witnesses in advance and prejudice the minds of the jury against their subsequent testimony. The evidence upon the real question at issue, viz., whether the sales were entirely by sample, or were coupled with a warranty of quality, was conflicting, and the recital of these wholly incompetent threats and accusations was, in our opinion, such error as to require a new trial before another jury.

The court also instructed the jury that in each of the four contracts in evidence there was an express warranty on the part of the seller that the flour to be delivered "should be satisfactory to the plaintiff," and that if the jury find from the evidence that the flour which was delivered was not satisfactory to the plaintiff, "then you are instructed that there was a breach of that warranty on the part of the defendant." This instruction is misleading under the facts of this case. From it the average jury would understand that all the plaintiff was required to prove in order to entitle it to recover damages was that the flour delivered was not satisfactory to the plaintiff, regardless of the plaintiff's reasons for such alleged dissatisfaction. There are cases where such a rule might apply, as where one party agrees to do a thing to the satisfaction of another, the character of which is a matter of taste, fancy or judgment on the part of the buyer, such as a portrait, a suit of clothes, a dramatic composition, or the like. "But where the matter involved is not one of taste, fancy or judgment, but of common experience, such as an ordinary job of mechanical work, <u>or the quality of material</u>, a different

rule applies, and in such cases the law will say what in reason ought to satisfy a contracting party does satisfy him." (Union League Club v. Ice Machine Co., 204 Ill. 117, 126.) See also Keeler v. Clifford, 165 Ill. 544. Moreover, it may well be doubted whether the language of the contracts in question requiring the goods to be "satisfactory" to the plaintiff constitutes an express warranty in the sense used in this instruction. Standing alone, these words of the contracts amount to nothing more than a condition precedent, or option, under which the buyer, within a reasonable time after the delivery of the goods, might have rejected or returned the goods without liability for the purchase price. But here the flour was received, paid for, and stored by plaintiff for six months thereafter, and there is no evidence that plaintiff returned, or offered to return, the goods at any time. It would be a strange rule that would permit a buyer of such goods under such circumstances to recover damages thereafter merely on proof that he was not satisfied with the goods so delivered, accepted and paid for.

Complaint is also made of the ruling of the court in denying appellant's motion, made at the opening of the trial, to require appellee to elect, as between the alleged opposing theories of liability set forth respectively, in the first four counts of the declaration, and in the next four counts thereof. The ruling was correct. The first four counts are not based upon any alleged rescission of the contracts, as counsel claims, but on an alleged failure to deliver the flour ordered. The next four counts are based upon an alleged warranty of quality.

Appellee's counsel presents in his brief a reargument of a motion heretofore made in this court to strike the bill of exceptions from the record. That motion was heard by another branch of this court. It was not reserved but was denied. We

rule applies, and in such cases the law will say that in reason ought to satisfy a contracting party that satisfy him." (Hales Lessee Dyck v. Los Angeles Co., 80 Cal. 217, 1890.) See also Parker v. Gallford, 148 Ill. 364. However, it may well be doubted whether the language of the contracts in question excluding the goods to be "satisfactory" to the plaintiff constitutes an express warranty in the sense used in this instrument. Stating alone, these words of the contracts amount to nothing more than a condition precedent, or option, under which the buyer, within a reasonable time after the delivery of the cows, might have rejected or returned the goods without liability for the purchase price. But here the cows are received, paid for, and stored by plaintiff for six months thereafter, and there is no evidence that plaintiff returned, or offered to return, the goods at any time. It would be a strange rule that would permit a buyer of such goods under such circumstances to recover damages thereafter merely on proof that he was not satisfied with the goods on delivery, accepted and paid for.

Complaint is also made of the taking of the notes in denying appellant's motion, made at the opening of the trial, to require appellee to elect, as between the alleged breaches of warranty or liability set forth respectively, in the first four counts of the declaration, and in the next four counts thereof. The motion was overruled. The first four counts sue upon express alleged violations of the contracts, as noted supra, but on an alleged failure to deliver the first cows. The next four counts are based upon an alleged warranty of quality.

Appellee's counsel proceeds in his brief a construction of a motion heretofore made in this court to strike the bill of exceptions from the record. That motion was based by analogy upon a rule of this court. It was not sustained but was denied. The

have looked into the files and have ascertained that a very full presentation by suggestions and counter-suggestions upon said motion was made at that time. We will not reconsider the motion.

For the reasons stated the judgment of the Circuit Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

been lacking here the (2)we not have assertions that a very full consumation of appearance and number-appearance upon said motion was made at that time. We will not verify the motion.

For the reason stated the judgment of the circuit Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes, J., and Dailey, J., concur.

341 - 28176

SANDOR NAGY, Appellee, vs. FORT DEARBORN NATIONAL BANK, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In 1916 William A. Fuzy was engaged, at East Chicago, Indiana, in a business described by one of the witnesses as "Foreign Exchange and Steamship Tickets." He had an arrangement with appellant under which he was to make his remittances for foreign exchange through appellant's bank, and for that purpose the bank furnished him daily with cards showing the current rates of exchange with foreign countries, and also furnished him printed blanks for his use in listing his orders to appellant. Such blanks bore the following printed heading:

"FOREIGN POST REMITTANCES.
WILLIAM A. FUZY, AGENT.

TO FORT DEARBORN NATIONAL BANK, CHICAGO.
Please execute the following payments:

No.	Name and Address.

"

On March 17, 1916, appellee, Sandor Nagy, gave Fuzy $250.50, plus exchange, with which to purchase for appellee 2000 Hungarian crowns, to be placed to appellee's credit in the government postal savings bank at Budapest. Fuzy told appellee that his order would be sent through appellant's bank, and on the same day Fuzy sent to appellant, upon one of the blanks above mentioned, a list of eight orders for the purchase of Hungarian crowns, to be placed to the credit of eight different persons in Hungary, together

SAMUEL KNOX, Appellee, vs. THE BALTIMORE BOTANICAL SOCIETY, Appellant.	APPEAL FROM MUNICIPAL COURT OF BALTIMORE.

OPINION.

No. 5[illegible]. Judgment from municipal court for appellee of [illegible] and costs.

Decided [illegible].

The facts in this case were assumed, on case stated, before, in a judgment rendered by one of the aldermen as "Justice Municipal and Criminal Court." He had an agreement with municipal motor which he was to make his residence for Baltimore entirely through municipal's book, and for that purpose the book furnished his daily with cards showing the numbers of matters with foreign countries, and also furnished the yellow blanks for the use in filling his orders in triplicate. Each blank bore the following printed heading:

"FOREIGN PORT MERCHANDISE.
"PLACE A. FOR, [illegible].

"I DO HEREBY CERTIFY THAT, [illegible].
"Please enclose the following payment:

_____

No. Name and address.

_____

_____

In order to, [illegible], contrary, Baltimore Body, gave that [illegible], plus [illegible], with which is necessary for operation that Baltimorian orders, to be placed in municipal's order in the government postal packing box in Baltimore. They had requested that his order would be sent through municipal's book, and on the same day they sent in requisition, upon one of the blanks above mentioned, a list of eight orders for the purchase of foreign goods, to be placed in the hands of eight different persons in Europe, together

with the sum of $605.76 to cover the cost of the same. One of the items thus listed was the order of appellee. The names and addresses on this list were given in a mixture of English and a foreign language. The item referring to appellee, as translated, called for the deposit of 3000 Hungarian crowns with the Hungarian Royal Postal Savings Bank of Bereg Szom, Bereg County, Hungary, with the English notation: "Get the Dep. Book," and the following words: "Sender If. j. Nagy Sandor" - meaning that the name of the sender of this order was Sandor Nagy, the appellee. It appears from the evidence that the postal savings bank mentioned had its main office in Budapest, and a branch at Beregszom, the town mentioned in the order.

On the next day appellant wrote to Fuzy acknowledging receipt of his "post remittances" for a total of 4330 crowns and Fuzy's check for $605.76, "which orders are having our prompt attention," adding: "We also note your request that we are to obtain a Deposit Book to cover your order #59305 for Kr. 3000, and we are passing the necessary instructions to our Correspondents. **** We notice that you sent us four copies of the order but we only need one original and one duplicate." To this letter Fuzy replied: "The deposit book is satisfactory evidence."

The same day it received this order from Fuzy appellant mailed the order to its correspondent at Vienna, Austria, with instructions to "execute" the orders "as therein specified." This letter never reached Vienna.

It appears from the testimony of the assistant manager of appellant's foreign exchange department that it was the custom of appellant to ascertain at the end of each day how much money was needed in a foreign country to take care of its foreign business for that day, and then "to purchase the exchange and have it cabled to our credit to the respective bank." This custom the

with the sum of 4000.Vi is never the most of the sum. One of the items that listed was the order of upgrade. The sums and addresses on this list were given in a mixture of English and a foreign language. The line referring to upgrade, as translated, called for the deposit of some Hungarian crowns with the Hungarian Royal Postal Savings Bank of Cheap Sum, "Postal Savings", with the English explanation: "Get the Dep. Book," and the following words: "Number 17. j. Hungarian" - meaning that the sum of the number of this order was Number Ninty, the upgrade. It appears from the evidence that the postal savings book mentioned had its main office in Budapest, and a branch at Kecskemet, the town mentioned in the order.

On the next day applicant wrote to Burg acknowledging receipt of his "post remittance" for a total of 4000 crowns and Burg's check for 1000.Vi, "which orders we taking our prompt attention," adding: "We also make your request that we are in thank a Deposit Book to server your order (DEPOSIT for Mr. VOGT, and we are sending the necessary instructions in our correspondence. ... We notice that you want to have copies of the order out ... we only send one original and one duplicate." To this Ernst Burg replied: "The deposit book is satisfactory enclosed."

The same day it received this order from Burg applicant mailed the order to his correspondent in Vienna, Ernstin, with instructions to "execute" the orders "as towards remittance." This letter never reached Vienna.

It appears from the testimony of the assistant manager of applicant's foreign exchange department that it was the custom of applicant to ascertain at the end of each day how much money was needed in a foreign country to take care of the foreign remittances for that day, and then "to purchase the exchange and have it mailed to our agents in the respective bank." This making the

witness said was followed in this case; that is, it cabled to a bank in Rotterdam, Holland, to place to appellant's credit with the Wiener Bank Verein, at Vienna, 250,000 crowns. There is no evidence in the record that any part of this credit was ever directed to be paid to appellee, or his order, or was otherwise set apart or specifically appropriated to the use of appellee. In other words, the proof is to the effect that appellant had an account in the Vienna bank and made a deposit that day sufficient to meet all orders it had received from its customers on that day; and appellee's counsel upon the trial stipulated, subject to an objection as to the materiality of such evidence, that appellant thereafter kept a sufficient balance at all times in the Vienna bank to pay the 2000 crowns purchased by Fuzy, on behalf of appellee; but there is no evidence that any part of such funds was ever sent to Budapest to be deposited in the Postal Savings Bank to the credit of appellee, or otherwise directed to be paid to anyone for appellee's benefit.

On November 10, 1916, Fuzy, by letter, requested appellant to inform him what disposition had been made of his orders, mentioning, among others, the order numbered 59305, in which appellee's name appears. Appellant replied on November 13, 1916, that "owing to the impossibility of getting mail into Austro-Hungary" it could not trace the orders. There appears in the evidence a circular letter, dated May 24, 1916, which Fuzy testified he received from appellant, stating that wireless messages could then be sent to Vienna and recommending this service to its customers "for their payments to Germany and Austro-Hungary." But this method of communication with Vienna does not seem to have been used at any time to ascertain whether the orders mailed on March 18, 1916, had been received by appellant's correspondent in Vienna. There is no evidence to show

[illegible] mail was delivered in this case; that is, it could to a [illegible] in Zaisiedlung, Austria, to place in appellant's trunk with the Bauer Bank Vienna, at Vienna, Ohio, any account. There is no evidence in the record that any part of this profit was ever directed to be paid to appellee, or his order, or was otherwise [illegible] or specifically appropriated to the use of appellee. In other words, the proof is to the effect that appellant had an account in the Vienna Bank and made a deposit that day sufficient to meet all orders it had received from its customers on that day, and appellee's account upon the [illegible] [illegible] is no distinct [illegible] to the availability of such [illegible] that Auto-Client Bauer-Ter had a sufficient balance at all times in the Vienna Bank to pay the ECM orders presented by Ziegler, on behalf of appellee; but there is no evidence that any part of such funds was ever meant to Bauer-Ter to be retained in the Vienna Bank in the credit of appellee, or otherwise appropriated to be paid to appellee for appellee's benefit.

On February 11, 1918, Ziegler, by letter, requested appellee to inform him what disposition had been made of his orders, enclosing, among others, the order numbered 8010. In which appellee's name appears. Appellant replied on February 14, 1918, that "owing to the impossibility of getting mail into Austro-Hungary" it could not trace the orders. There was no [illegible] the evidence a similar letter, dated May 24, 1918, which Ziegler [illegible] [illegible] appellant, stating that various messages could then be sent by Vienna and Copenhagen, this being [illegible] to the assurance "that Ohio's relations to Germany and Austro-Hungary." The 1918 method of communication via Vienna does not seem to have been used at any time to correspondent [illegible] which orders mailed on March 18, 1918, had been received by appellant's correspondent in Vienna. There is no evidence to show

that the method of communication by cable to Rotterdam, and thence by wire to Vienna, which appellant's witness said was used on March 18, 1916, to cable a credit to Vienna with which to meet the orders of that day, was not also still open as a means of communication with Vienna.

Nothing further appears to have done in the matter by either party for nearly three years.

On July 1, 1919, appellant sent out a circular letter addressed "to our correspondents" advising them that "we are now able to resume cable and mail remittance business" with certain named foreign countries, including German Austria and Czecho Slovakia; that with reference to orders forwarded "prior to the United States entry into the war," it was expecting statements of account from its correspondents, and as soon as such statements were received it would "check up these old matters."

On August 16, 1919, Fuzy wrote to appellant referring to his former letter of November 10, 1916, and again requested information regarding the disposition of his orders, including those sent on March 17, 1916. Appellant replied on August 25, 1916, that "it will be some time before we are in a position to report on all orders forwarded," but "as soon as we ascertain the fate of those you have mentioned" it would advise him. Later (just when does not appear) appellant requested Fuzy to send it a list of his old orders so that they could be traced, and Fuzy on February 20, 1920, sent a memorandum of such orders, giving the numbers, the amounts, and the dates of the same. On March 31, 1920, appellant requested a more detailed description of such orders, to which Fuzy replied, under date of May 19, 1920;

"I wish to call your attention to the fact that on the dates mentioned I duly forwarded to you the advice sheets, which show the following:"

* * * * * * * * * * * *

"59305 - Kr. 2000 Magy. Kir. Posta Tak. Penztar, at Berg Megye for Savings Book to Ifj. Nagy Sandor. This no doubt will be issued at Pest."

* * * * * * * * * * * *

"If you had not sent these at the time, I believe it to be just that you remit to me the difference in the exchange, as I sent you at the time the prevailing rate, while now the rate is materially down. You not having drawn against your account at the time and effecting payment now after 4 years, I believe you will agree with me that you remitting to me the difference in the exchanges would only be but fair, just and right."

To this letter appellant replied: "We have now forwarded the particulars of these orders to our foreign correspondents, requesting them to immediately have the matters attended to, and on receipt of advice, we shall advise you," adding that appellant could not comply with Fuzy's request to refund the difference of exchange on orders "forwarded in 1916 and still unpaid," for the reason (as stated in the letter) that at the time the orders were originally "forwarded" to Vienna, appellant had purchased sufficient foreign exchange to cover the items and had the same placed to its credit in Vienna, and as the item was never paid, the Vienna bank "simply credits our account, and we have to resell the respective item, realizing only the current rate of exchange." When, if at all, the 280,000 crowns were credited back to appellant, does not appear. Fuzy did not thereafter press his claim for a "refund," - in that form, at least.

On June 10, 1920, the Vienna bank wrote to appellant stating that "With reference to the various claim lists which we received from you lately," some of the lists of orders (mentioning, among others, the list containing Fuzy's orders of March 17, 1916,) had never been received by the Vienna bank, and asking appellant

"I wish to call your attention to the fact that on the dates mentioned I duly forwarded to you the sums shown, which show the following:

* * * * * * * * *

"Total - Kr. 3,000 only. Kr. Ivers Ink. Frankr.
of Bank Ledge for Savings Book to 1?). Many thanks.
This sum would be issued at Post.

* * * * * * * * *

"If you had not sent these at the time, I believe it to be just that you remit to me the difference in the exchange, as I sent you at the time the prevailing rate, while now the rate is materially more. You not having drawn against your account at the time and effecting payment now after 4 years, I believe you will agree with me that you restitute to me the difference in the exchange would only be an act fair, just and right."

To this letter appellant replied: "We have now forwarded the principals of Kron notes to our Lisbon correspondents, requesting them to immediately have the matters attended to, and on receipt of advice, we shall advise you," adding that appellant could not comply with Ivy's request to refund the difference of exchange on orders "Transmitted in 1918 and still remain." For the reason (as stated in the letter) that at the time the orders were originally "forwarded" to Vienna, appellant had purchased sufficient foreign exchange to cover the items and had the sum placed to his credit in Vienna, and as the item was never paid, the Vienna bank "simply credits our account, and we have to remit the respective item, realizing only the current rate of exchange." Then, if at all, the 120,000 crowns were credited back to appellant, does not appear. Ivy did not thereafter press his claim for a "refund," - in that form, at least.

On June 10, 1920, the Vienna bank wrote to appellant stating that "with reference to the various claim lists which we received from you lately," some of the lists of orders (mentioning many dates, the last mentioning Ivy's orders of March 27, 1918) had never been received by the Vienna bank, and asking appellant

to furnish it with copies of such lists; and over four months later, on October 25, 1920, appellant requested Fuzy to mail to appellant duplicates of such orders. On October 29, 1920, Fuzy sent a second duplicate of such orders, expressing his impatience at the long delay, stating that he had been threatened with law suits, and that he enclosed the duplicates, "trusting that this will finally bring results." In this letter Fuzy again called appellant's attention specifically to appellee's item in the list, in the following words: "In this list appears 1 dep. to M. K. Posta Talarek original address Bereg Som. I take it that you will get the pass Book from Budapest, as this locality (Bereg Som) in Bereg Megye is now in the hands of Checho Slovakia I presume. Of course a Pass Book from Budapest will suffice."

A letter introduced in evidence, from the Vienna bank, shows that this duplicate list was not sent to Vienna by appellant until April 1, 1921. On May 31, 1921, the Vienna bank wrote that the Fuzy order for 2000 crowns to be sent to Beregson "could not be executed" because the "name of the beneficiary was missing." As above stated, the name of appellee, Sander Magy, was given (as the "Sender" who was to "get the deposit book") in the original order and in each of the duplicates that had been sent to appellant during the two years following the re-establishment of mail communication. This refusal of the Vienna bank to execute the order in May, 1921, was not communicated to Fuzy until September 16, 1921, when appellant wrote to him that its correspondent had returned the item for 2000 crowns unexecuted because the payee's name was missing and requesting him to supply "this additional detail."

Fuzy did not answer this letter. On October 14, 1921, appellant again wrote him to the same effect. Thereupon, on November 9, 1921, Fuzy wrote to appellant demanding that the

amount of $250.50 that he had paid to appellant upon this order in March, 1916, be refunded to him, threatening to sue if his demand was not complied with.

To this letter appellant replied at length, on November 14, 1921, stating, in substance, that the instructions appellant had sent in 1916 regarding appellee's order had never reached the Vienna bank, and that in accordance with Fuzy's request appellant had re-forwarded the item in 1920, but that even then "this item could not be executed as the name of the beneficiary was missing." The letter concluded by saying that if Fuzy will "supply us with this name, we will instruct our Vienna correspondent to forward the amount of 2000 Austrian crowns to the Hungarian Postal Savings Bank and 'have the deposit effected,'" otherwise it should be obliged to refund at the current rate for Austrian crowns. The current rate at that time for 2000 Austrian crowns was less than three dollars. Fuzy reiterated his demand for the $250.50 originally paid for the 2000 crowns. This closed the correspondence between Fuzy and appellant.

Two months thereafter, on January 13, 1922, appellant instructed the Vienna bank to transfer 2000 crowns to the Hungarian Postal Savings Bank and to issue a deposit book for the same in Fuzy's name. In pursuance of these instructions, the Vienna bank deposited in the Hungarian Postal Savings Bank at Budapest 374-24/100 crowns, which was then the equivalent in Hungarian exchange for 2000 Austrian crowns, and said Postal Savings Bank issued its receipt in Fuzy's name for such deposit. This appears to have been the first time any deposit was made by appellant in the Budapest bank and it appears that such crowns were then worth about sixty cents.

Appellee brought suit to recover the amount paid in 1916, and upon a trial before the court without a jury was given

amount of $[illegible]. That he had paid in upholstery upon this order in March, 1919, he referred to him, threatening to sue if his demand was not complied with.

In this letter upholstery supplied on Length, on December 14, 1918, stating, in substance, that the installation equipment had used in 1918 upholstery equipment's order and never received the Vienna book, and that it [illegible] [illegible] equipment equipment and performance [illegible] [illegible], but that when then "this item did not be accepted as the case of the manufacturer was wrongly." The letter concluded by saying that if they will "supply us with this order, we will immediately use Vienna manufacturing to forward the amount of [illegible] towards the Dangerfield Patent Leather Shoes and "have the benefit attached," otherwise it should be obliged to return it for current work for American owners. The current price at that time for 3000 instead cross was less than three dollars. They explained his demand for the $[illegible] originally paid for the 3000 lasts. This claimed the correspondence between Lucy and upholstery.

The matter therefore, on January 14, 1920, upholstery transferred the Vienna book to Lucy's 3000 lasts as the Dangerfield Patent Leather Boot and to issue a demand note for the same in Lucy's name. In performance of these instructions, the Vienna book disappeared in the Dangerfield Patent Leather Boot of Manufacturer Dangerfield's owners, which was then the equivalent in Dangerfield standards for American owners, and such Patent Leather Shoe issued the receipt in Lucy's name for such repairs. This appears to have been the first time any company was made by upholstery in the Dangerfield book and it appears that such orders were then worth about [illegible].

Upholstery brought suit to recover the amount paid in 1919, and upon a trial before the court without a jury was given

judgment for that amount with interest.

The theory upon which this suit was brought by appellee was that the transaction that occurred in March, 1916, was an executory contract of purchase, which has never been performed by appellant, and which appellee was entitled to rescind because of such non-performance, and to recover back the consideration he had paid.

That a purchase of the character shown by the evidence may be rescinded if it remains wholly unparformed after the lapse of a reasonable time for such performance, and that in case of such rescission the purchaser is entitled to recover back the money paid with interest, finds support in a number of New York decisions, particularly the cases of Chemical National Bank v. Equitable Trust Co., 194 N. Y. Supp. 177; and Safian v. Irving National Bank, 196 N. Y. Supp. 141.

In the former case, the plaintiff, on March 21, 1917, paid to the defendant $8,000 upon the latter's agreement to cable a transfer of credit to the Deutsche Bank, in Berlin, to the credit of one Rossie. When the war with Germany was declared on April 6, 1917, defendant was told the cable had not been sent, although an unsuccessful attempt to send it had been made. The defendant had also mailed a letter to the Deutsche Bank to make the payment as directed in the cable transfer, but this letter was not delivered and the defendant was not informed of this latter fact until December 30, 1919. The plaintiff then sued to recover the $8,000 it had deposited, as upon a rescission of a contract. The defendant tendered $800, the value of the marks in December, 1919, which was refused. It was held that the transaction was an executory contract, citing Equitable Trust Co. v. Keene, 232 N. Y. 290; that the entire failure of the defendant to perform such contract entitled the plaintiff to

rescind it, and to recover in an action for money had and received, the amount it originally deposited.

In the second case above mentioned, the plaintiff paid to the defendant bank $305 for a cable transfer of 7000 marks to be paid to one Moszek Zelik Safian, at Makow, in Poland. Defendant at once cabled its correspondent in Warsaw directing such payment to be made. To do so it was necessary to transmit by mail a postal order to the address at Makow. The payee was notified by plaintiff and called upon the postal authorities for the postal order. Through some mistake, however, the postal order had been made out to Moszek Zelik, and the postal authorities refused to deliver it to Moszek Zelik Safian, whereupon plaintiff demanded his money back, and upon defendant's refusal to repay it, brought suit. The court held he was entitled to recover the amount paid, upon the ground that "when the defendant failed to perform, the plaintiff was entitled to his money back, - not the value of the marks at that time, estimated in the exchange value of the marks, but the American dollars which he had paid, which the defendant had had the use of, and which it had profitable employed. The defendant could not profit by its own wrong and tender back that which it had received measured by the depreciated value of that which it had agreed to pay in the foreign country."

Appellant's counsel contends first: that the Vienna bank, selected by appellant to forward the remittances to the Postal Savings Bank at Budapest, became appellee's agent, for whose negligence or default, if any, appellant is not liable; second: that appellee was not entitled to rescind the contract for the reason that it was partly performed by appellant before such attempted rescission; and third: that the measure of damages for any breach of such contract is the value of the 2000 crowns at the time Fuzy made his demand for payment, or at the time when [illegible] have been made in the method provided by the

recount it, and to recover in an action for money had and received, the amount it originally deposited.

In the account case above considered, the plaintiff paid to the defendant bank $500 for a bills payable account of 7000 marks to be paid in one Hungarian Milliard Kulpen, or Pengo, in Budapest, otherwise at one months date in correspondence in German currency which amount is to be made. To do so it was necessary to transmit by mail a postal money in the ordinary manner. The bank had notified to plaintiff and asking upon the usual notice for the proper orders. Thereby also relying, however, on getting value and have made out in Hungarian Milliard, and the usual authorities returned to deliver it to Hungarian Milliard Kulpen, plaintiff demanded his money back, and upon defendant's refusal to repay it, brought suit. The court held he was entitled to recover the amount paid, upon the ground that when the defendant failed to perform, the plaintiff was entitled to his money back, - not the value of the marks at that time, estimated in the exchange value of the marks, but the material dollars which he had paid, with the interest and had the use of, and which it had profitably employed. The defendant could not profit by its own wrong and deprive back that which it had received measured by the depreciated value of that which it was agreed to pay in the foreign country."

Appellant's counsel maintain that the Chase Bank, related by appellant to transmit the instrument to the Postal Savings Bank of Budapest, became appellee's agent, for whose negligence or default, if any, appellant is not liable; account that appellee was not entitled to recover the consumed for the reason that it was partly performed by appellant before such attempted rescission; and that the liability of Chase for any breach of such contract is the value of the $500 current at the time they made his demand for payment, or at the time when

contract.

As to the first of these contentions, counsel admit there are no Illinois decisions to the effect that in cases of this character a foreign correspondent of a forwarding bank is the agent of the purchaser, but they cite cases in Illinois, and elsewhere, where it appeared that a check or draft on a distant bank was deposited in a forwarding bank for collection, in which cases it is held that if the bank in which such deposit is made selects a suitable correspondent and gives the latter proper instructions regarding the collection, the correspondent bank becomes the depositor's agent and is liable to the depositor for any loss occasioned by such correspondent's negligence or default. We do not think such decisions can have any proper application to cases of the character here involved. But if, by any process of reasoning, the rule so announced in collection cases can be applied to cases like this, such rule would not help appellant. The argument assumes that if there was any negligence, it was that of the Vienna bank. It clearly appears from the evidence, however, that the Vienna bank had no knowledge whatever of appellee's order or of the fact that appellant had ever agreed to transmit such an order until March or June, 1920, and that the information which was then sent to the Vienna bank by appellant regarding appellee's order was so indefinite that the Vienna bank requested appellant to forward a copy of such order. This request on the part of the Vienna bank was not complied with by appellant until April 1, 1921, more than five years after the order was originally given, and nearly two years after appellant had notified its customers that it was ready to resume cable and mail remittance business with Austro-Hungary. Certainly, this delay was not the fault of the Vienna bank. It may have been the Vienna bank's fault that it did not make payment, even then, to the Postal Savings Bank at Budapest

matter.

As to the first of these contentions, counsel admit there are no ultimate decisions to the effect that in cases of this character a foreign correspondent of a forwarding bank is the agent of the purchaser, but they cite cases in Illinois, and elsewhere, where it appears that a check or draft on a distant bank was deposited in a forwarding bank for collection, in which cases it is held that if the bank in which such deposit is made selects a suitable correspondent and gives the latter proper instructions regarding the collection, the correspondent bank becomes the depositor's agent and is liable to the depositor for any loss occasioned by such correspondent's negligence or default. We do not think such decisions can have any proper application in cases of the character here involved. But if, by any process of reasoning, the rule as announced in collection cases can be applied to cases like this, such rule would not help appellant. The argument assumes that if there was any negligence, it was that of the Vienna bank. It already appears from the evidence, however, that the Vienna bank had no knowledge whatever of appellee's order or of the fact that appellant had ever agreed to transmit such an order until March or June, 1920, and that the information which was then sent to the Vienna bank by appellant regarding appellee's order was so indefinite that the Vienna bank requested appellant to forward a copy of such order. This request on the part of the Vienna bank was not complied with by appellant until April 2, 1921, more than five years after the order was originally given, and nearly two years after appellant had notified his customers that it was ready to receive sub-s and milk installment payments with interest-thereon. Certainly, this delay was not the fault of the Vienna bank. It may have been the Vienna bank's fault that it did not make payment, even then, to the Central Savings Bank at Dubuque

and get a deposit book in the name of appellee therefor, as the order required, but it is more probable, (notwithstanding the letters of appellant to Fuzy that it had reforwarded the item) that the order as then sent by appellant was not a complete copy of the order; for the Vienna bank wrote that it could not execute the order because the payee's name was missing from the order. As above stated, appellee's name appeared in the order as given to appellant as the "sender" of the order, in whose name the deposit at Budapest was to be made. When Fuzy was notified of the failure and refusal of the Vienna bank to comply with the order for the reason thus stated after duplicates of such order had been at least twice sent to appellant Fuzy's patience was exhausted and he demanded the return of the money paid for the order.

As to the contention that the contract had been partly performed at the time of such demand, we think the facts, when fairly considered, do not justify this claim. All that had been done by appellant during the five and one-half years that elapsed after it was paid to establish for appellee a credit of 2000 crowns in the Postal Savings Bank at Beregsson, Hungary, was to make ineffectual efforts by mail to establish such a credit, and to cable its correspondent at Rotterdam, Holland, to forward to the Vienna bank - not to the Postal Savings Bank at Budapest or Beregson - a general credit of 250,000 crowns, in order to enable the Vienna bank to make payments on such orders as it should thereafter receive from appellant. Appellant attempted, in March, 1916, to send appellee's order by mail, but failed in such attempt, presumably because of some interruption to the mail service in Europe on account of the war in Europe at that time. The United States did not enter the war for more than a year after this futile attempt was made, and during that time appellant made no effort to ascertain by cable, or wireless, or

and got a deposit book in the name of appellee therefor, in the great country, but it is more probable, inasmuch as the letters of appellant to show that it had reformatted the item that the order as then sent by appellant was not a complete copy of the order, for the Vienna bank claim that it still not matched the order because the payee's name was missing from the order. As above stated, appellee's name appeared in the order as given to appellant on the "sender" of the order, in whose name the deposit at Budapest was to be made. When they was notified of the failure and refusal of the Vienna bank to comply with the order for the reason that stated after qualification of the order had been at least taken sent to appellant bay's petitions was abandoned and he demanded the return of the money paid for the order.

As to the contention that the contract had been partly performed at the time of such demand, on theirs the Vienna, when fairly considered, do not justify this claim. All that had been done by appellant during the five and one-half years that elapsed after it was paid to authorize for appellee a credit of $500 drawn in the Postal Savings Bank at Budapest, Hungary, was to make informal efforts by mail to authorize such a credit, and to make its representative at Vienna, Austria, to forward to the Vienna bank - not to the Postal Savings Bank at Budapest or Hungary - a general credit of $500 (Item). In order to enable the Vienna bank to make payments on such orders as it should thereafter receive from appellant, inasmuch as attempted, in March, 1921, to send appellee's order by mail, but failed in such attempt, presumably because of some interruption to the mail service in Europe on account of the war in progress at that time. The United States did not enter the war for more than a year after that fatal attempt was made, and during that time appellant made no effort to complain by cable, or wireless, or

letter, whether its mail orders had been received by its correspondent in Vienna. Long after the war was over, appellant made an effort to perform its contract by mailing another letter to its correspondent in Vienna. Such effort again failed because its instructions to its Vienna correspondent were not sufficiently definite as to facts appellant had or should have had in its possession all the time. Hence, the claim of partial performance must rest entirely on the cable message to Rotterdam. That message merely directed the bank at that place to make a deposit to the general account of appellant in the Vienna bank, and such account remained there subject wholly to appellant's control. No part of the funds so provided for at Vienna were by such cable message directed to be applied to the payment of any particular order, and no part of such fund was thereby made any more available to appellee than if the cable message had never been sent. The cable message did not if itself impose upon appellant any obligation to keep such credit, or any part of it, intact for the benefit of appellee or the other customers of appellant who made similar contracts in March, 1916. Such funds could have been applied by appellant to the payment of other orders of appellant without any liability to appellee resulting from that fact alone. At most, the cable to Rotterdam was a purchase by cable of sufficient Austrian currency in Vienna to enable appellant's correspondent there to pay out of such currency such orders as appellant might thereafter direct such correspondent to pay. In other words, it was an act by which appellant prepared to be ready and able to perform its contracts with all its customers, but was not of itself a performance of any part of appellee's contract.

In the case of Scheibe v. Zaro, 192 N. Y. Supp., 433, cited by appellant in support of this theory of part-performance, the plaintiff, on January 15, 1917, paid the defendant $3630 to

factor, whether the mail orders had been received by the correspondent in Vienna. Long after the war was over, appellant made an effort to prove his contention by calling witnesses before the correspondents in Vienna. Such effort again failed because the instructions to the Vienna correspondent were not sufficiently definite as to facts appellant had or should have had in the possession all the time. Hence, the claim of partial performance must rest entirely on the single message to Berlin. That message merely directed the bank at that place to make a deposit in the general account of appellant in the Vienna bank, but made no mention of appellant's [illegible]. In part of the funds to be provided for it Vienna was by such single message directed to be utilized to the payment of any particular order, and no part of such fund was thereby made any more available to appellant than if the single message had never been sent. The single message did not of itself impose upon appellant any obligation to keep such funds, or any part of it, intact for the benefit of appellee or the other creditors of appellant who made similar orders in Kerns, Ohio. Such funds could have been applied by appellant to the payment of other orders of appellant without any liability to appellee notwithstanding the single message. As such, the mere to instruction was a purchase by order of sufficient funds sufficient authority for Kerns to enable appellant's correspondent there to pay out of such purchase to be drawn against with thereafter direct such correspondent to pay. In other words, it was not by this single message [illegible] is to enable and obliged to perform its contract with all its creditors, but was not of itself a performance of any part of appellant's contract.

In the case of [illegible] v. [illegible], 120 N. Y. 488, cited by appellant in support of the theory of partial-performance, the plaintiff, on January 12, 1871, sent the defendant [illegible]

have 30,000 marks remitted to a specified savings bank in Berlin. The banking law of New York required such remittance to be made within five days. Within such five days the defendant purchased from the Chase National Bank 50,000 marks and had the same transferred from that bank to the Dresdner Bank, the defendant's regular correspondent. The opinion says: "This 50,000 marks included the 20,000 marks credit for the plaintiff." Whether this quotation is a statement of fact, or a legal conclusion, does not appear from the opinion. Three of the five judges of that court held that this was a partial performance of the contract, which prevented a rescission, and that plaintiff was only entitled to damages for the breach of defendant's duty to make payment at the time when defendant could with reasonable diligence have ascertained whether the letter and draft had reached the savings bank in Berlin; and the case was remanded for a new trial because there was no evidence of the value of such marks at that time. Two of the judges dissented upon the ground that: "The transfer of the marks to the credit of the defendant in the Dresdner Bank did not perform the agreement to transfer the marks to the Berlin Savings Bank. Therefore, the plaintiff was entitled to recover back the money she paid to the defendant."

The case of Chemical National Bank v. Equitable Trust Company, supra, mentions the case of Scheibe v. Zaro, supra, and distinguishes it on the facts, holding that the mere fact that a selling bank has sufficient money on deposit in a foreign bank to make a transfer good if made, does not prevent a buyer from rescinding a contract, unless there is proof of damage to the defendant in retaining the deposit for the payment of the particular draft. In the case of Safian v. Irving National Bank, supra, the opinion of the court was written by one of the judges who dissented in the case of Scheibe v. Zaro, supra, and in the Safian case the

have $8,000 marks credited to a specified savings bank in Berlin. The banking law of New York requires such vouchers to be made within five days. Within such five days the defendant procured from the Chase National Bank $8,000 marks and had the same transferred from that bank to the Reichsbank, the Imperial's depository. The exchange rate [illegible] $8,000 marks included the $8,000 marks credit for the plaintiff. Whether this constitutes a statement of fact, or a legal conclusion, does not appear from the opinion. Three of the five judges of the court held that this was a partial performance of the contract, which prevented a rescission, and that plaintiff was only entitled to damages for the breach of defendant's duty to make payment at the time when delivery had been tendered. [illegible] the Taylor and Arnold had rescinded the exchange bank in Berlin; and the case was remanded for a new trial because there was no evidence of the value of such marks at that time. Two of the judges dissented upon the ground that: "The transfer of the marks to the credit of the defendant in the Imperial Bank did not perform the agreement to transfer the marks to the Chase National Bank. Plaintiff, too, plaintiff was entitled to recover back the money she paid to the defendant."

The case of Chemical National Bank v. Kuhlmann Trust Company, supra, resembles the case of Jordan v. Lake, supra, and distinguishing it on the facts, holding that the mere fact that a selling bank has sufficient money on deposit in a foreign bank to make a transfer good if made, does not prevent a breach from remaining a contract, unless there is proof of change to the defendant in requiring the deposit for the payment of the particular draft. In the case of Jordan v. Irving National Bank, supra, the opinion of the court was written by one of the judges who dissented in the case of Jordan v. Lake, supra, and in the opinion of the

court held the plaintiff was entitled to rescind the contract as for an entire non-performance, although the defendant, in that case, at once cabled its correspondent in Warsaw, directing payment to be made as ordered.

There is no proof in the present case that the crowns which appellant had on deposit in the bank of its Vienna correspondent in March, 1916, could not have been sold by appellant at any time during the following three years without loss to appellant, and were not in fact so sold, and as no reason appears from the evidence why appellant did not ascertain, by cable or wireless message (if it could not do so by mail) whether its correspondent had received the orders sent in March, 1916, any depreciation in the value of such crowns during that period, if there was any such depreciation, is chargeable to the negligence of the appellant, and not to any fault of appellee.

What we have said disposes of appellant's third contention as to the measure of damages for a breach of such a contract as the one here involved. Appellee did not sue, or recover damages, for a supposed breach of contract, but sued for and recovered the amount he had paid upon a contract that had not been performed in whole or in part. The basis for this recovery is that the consideration paid for the contract wholly failed, and therefore appellee is entitled to the return of such consideration with interest from the time such contract was made.

For the reasons stated the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Gridley, J., concur.

365 - 28200

ITALIAN VINEYARD CO.,
Appellee,

vs.

E. E. WALSH, Trading as
WALSH TRANSFER CO.,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant in the Municipal court to recover the value of thirteen barrels of wine which appellee had delivered to appellant to be stored in his warehouse and which appellant failed to return to appellee on demand. There was a jury trial and a verdict in favor of appellee assessing damages at $1752.98, upon which judgment was entered. In this court appellant claims (1) that the statement of claim is insufficient and judgment should have been arrested on motion; (2) that the court's oral instructions to the jury upon the question of the burden of proof were erroneous; and (3) that the court admitted improper evidence.

1. The statement of claim alleges in substance that appellant was engaged in the business of storing and carting merchandise for hire; that on or about October 20, 1920, appellee delivered thirteen barrels of wine of the value of $2.65 a gallon to be stored and safely kept, and returned to appellee on demand; that on December 10, 1920, appellee demanded the return thereof, which appellant failed to do. Appellant contends that this statement of claim is insufficient because it does not allege negligence on the part of appellant. It does, however, allege facts which if proved make out a prima facie case of negligence in cases of bailments of this character. As a legal proposition, it would add

nothing to appellee's statement of claim to say that the failure to return the stored goods on demand was negligence, for on proof of such facts the law presumes negligence. (Schaefer v. Safety Deposit Co., 281 Ill. 43.)

2. It appears from the evidence that the reason the goods were not returned when demanded was that the storeroom in which they had been placed had been broken into and the goods removed therefrom by some unknown person or persons. Two witnesses testified that the storeroom containing the wine was locked with a padlock and that the staple in which such padlock was inserted had been pulled out and the framework of the door at that point damaged, and that this occurred without the knowledge of appellant. There was evidence that there was a watchman at night in the warehouse, but none in the daytime. In its oral instructions the court first stated the general rule requiring a warehouseman to use ordinary care to safely keep stored property and redeliver it on demand. Then the court continued as follows:

> "It appears without dispute in this case that this wine was delivered by the plaintiff to the defendant, and that it was stored in the defendant's warehouse. It appears also without contradiction that the defendant did not redeliver to the plaintiff at the time when the plaintiff demanded its return. That raises a presumption against the defendant; that is, a presumption which the defendant is bound to explain; that is, the burden of proof shifts, as we say, under such circumstances and throws upon the defendant the burden of showing that it exercised ordinary care with reference to this property, and unless it can show by a preponderance of the evidence that it did exercise ordinary care with reference to the property, then it would be liable in this case to the plaintiff for the value of the property."

This instruction, as applied to the facts in this case, is clearly erroneous. It was necessary for appellee to allege and prove negligence on the part of appellant. A prima facie case of negligence was made by showing that the property was stored with appellant and that he failed to return it on demand.

The authorities agree that upon such proof being made, it is incumbent upon a defendant to prove that the goods were lost or destroyed through no fault of the defendant; and if such proof shows that the goods were lost through fire or theft without any fault on the part of the defendant, then the presumption of negligence arising from the mere failure to return the property on demand no longer obtains. This rule is stated in the case of Claflin v. Meyer, 75 N. Y. 260, in the following language:

> "The cases agree that where a bailee of goods, although liable to their owner for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for such non-delivery * * this is to be treated as prima facie evidence of negligence. * * *
>
> "But where the refusal to deliver is explained by the fact appearing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no prima facie evidence of his want of care, and the court will not assume in the absence of proof on the point that such fire or theft was the result of his negligence. * * * It is not of course intended to hold that a warehouseman, refusing to deliver goods, can impose any necessity of proof upon the owner by merely alleging as an excuse that they have been stolen or burned. These facts must appear or be proved with reasonable certainty. Nor do we concur in the view that there is in these cases any real 'shifting' of the burden of proof. The warehouseman in the absence of bad faith is only liable for negligence. The plaintiff must in all cases, suing him for the loss of goods, allege negligence and prove negligence. This burden is never shifted from him."

In the recent case of Koczora v. Standard Safe Deposit Co., 281 Ill. App., 43, where the plaintiff sued to recover money taken from a safe deposit box, this court had occasion to examine and decide the question of the effect of a similar instruction to the one in question. In that case it was held error to instruct the jury that "if the jury believe from the evidence that the defendant has not proved by a preponderance of the evidence" that it exercised ordinary care, and that plaintiff thereby lost her money, the verdict should be for the plaintiff. In that case the cause of the alleged loss was unknown, while in this

The authorities were that such risk rests upon bailees. It is inadmissible upon a different to prove that the goods were lost or destroyed through no fault of the defendant; and if such proof shows that the goods were in a burning fire or theft without any fault on the part of the defendant, then the presumption of negligence arising from the mere failure to return the property is deemed no longer obtains. This rule is stated in the case of Phillips v. Hyatt, 75 N. Y. 346, in the following language:

> "The owner sues only where a bailee of goods, although liable in their power for their loss only in case of negligence, fails, nevertheless, upon their being demanded, to deliver them or account for them. Non-delivery * * * is in the bailee as prima facie evidence of negligence. * * *
>
> "But where the bailee is enabled to explain by the fact showing that the goods have been lost, either destroyed by fire or stolen by thieves, and the bailee is therefore unable to deliver them, there is no prima facie evidence of his fault of duty, but the burden falls on the owner of proof of the point that such fire or theft was the result of his negligence. * * * It is not of course sufficient to infer that a burglary, robbery or theft may occur, nor impose any necessity of proof upon the owner to negative negligence in an action. It may have been obtained by burglary. These facts must appear or be proved with reasonable certainty. But in no respect in the view that there is in these cases any real 'shifting' of the burden of proof. The burden remains in the beginning of and to the end upon the plaintiff to show that the defendant is not liable for negligence. The plaintiff must in all cases, making his far the loss of goods, allege negligence and prove negligence. This burden is never shifted from him."

In the recent case of Morris v. Standard Gas & Electric Co., 201 Ill. App., 12, where the plaintiff had to recover money taken from a safe deposit box, this court had occasion to examine and decide the question of the effect of a similar instruction in the one in question. In that case it was held error to instruct the jury that "if the jury believe from the evidence that the defendant has not proved by a preponderance of the evidence" that it exercised ordinary care, and that plaintiff thereby lost her money, the verdict should be for the defendant. In that case the cause of the alleged loss was unknown, while in this

case there was evidence that the wine had been stolen.

It will be noted that in the instruction in question the court told the jury that after the plaintiff had made its prima facie case, "the burden of proof shifts" to the defendant, who must then prove by a preponderance of the evidence that he exercised ordinary care in the keeping of the goods. In Biles v. International Hotel Co., 289 Ill. 320, where a similar question was presented, the court said:

> "The weight of modern authority holds the rule to be that where the bailor has shown that the goods were received in good condition by the bailee and were not returned to the bailor on demand, the bailor has made out a case of prima facie negligence against the bailee and the bailee must show that the loss or damage was caused without his fault. (Cumins v. Wood, 44 Ill. 416; Schaefer v. Safety Deposit Co., supra.) The effect of this rule is, not to shift the burden of proof from plaintiff to the defendant but simply the burden of proceeding."

In this case after the instructions were given counsel for appellant expressly objected to the instruction in the following words: "I object to the instruction that the burden shifts. The burden of proceeding shifts, but not the proof. The burden of proving the case is always on the plaintiff." This objection uses almost the language of the Supreme Court in the case last above cited, and the instruction should have been modified.

3. Complaint is made that the court permitted evidence to the effect that upon discovering the loss appellant told appellee he would pay for the goods but would never store any more wine. We think this evidence was incompetent and irrelevant and should have been stricken on appellant's motion.

The judgment of the Municipal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

384 - 28219

HERBERT S. FURSTENBERG,
Appellee,

vs.

AMERICAN ALLIANCE INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

In April, 1921, appellee owned an automobile, and was insured by the appellant insurance company against loss or damage by theft of the same. On April 23, 1921, the automobile was stolen. Appellee reported the theft to the police, who recovered the car the next day. When appellee went to the police station to get it he found it stripped of all of the tires and rims, and found the two front fenders "bent in." He at once had five new cord tires put on, and drove the car away. The next day he reported the loss to the insurance company's agents, who directed the car to be sent to a garage where one Francis was employed who, they said, "would take care of it." The automobile was taken to the garage as directed, and Francis looked over it. According to Francis, appellee and his brother called on Francis and, after some dispute as to what repairs were necessary, offered him a suit of clothes, and, later, three twenty-dollar bills, to have the insurance company "paint the car and put on a new top," as well as to make other repairs. Francis testified that he asked for time to consider the matter, and later told appellee by telephone he could send a check for the $60, whereupon a certified check, signed by appellee's sister, was sent to Francis, who turned it over to the insurance agents. Soon

after, the insurance agents telephoned appellee to come to their office to settle the claim. Appellee testified that he went as requested and took with him formal proofs of loss; that on entering the agents' room he presented such proofs, whereupon the agents began asking questions regarding his claim, and produced the $60 check, of which he denied any knowledge; that thereupon one of the agents roughly accused him of falsehood, and refused to pay his claim, whereupon he left the office, taking the proofs with him, and brought suit in the Municipal Court.

The statement of claim recites the making of the insurance policy; the theft of the automobile; its return in a damaged condition; states that five tires, tubes and rims were missing; that there was damage to the front fenders; that plaintiff "was obliged to recolor and revarnish the body of the car;" that he complied with all the terms and conditions contained in the policy, and that there is due him $380.60. The affidavit of merits denies that plaintiff complied with all the terms and conditions of the policy; avers that he did not deliver to the insurer any sworn proof of loss; that the terms of the contract provide that it shall be void if plaintiff was guilty of fraud or false swearing; that plaintiff was guilty of fraud and attempted to cheat the defendant by alleging a greater loss than the plaintiff had sustained and by attempting fraudulently to collect for the cost of making repairs for which defendant had previously paid the plaintiff in settlement of claims occasioned by two prior thefts of the same automobile, and by attempting by bribery to secure a favorable report upon his fraudulent claim. There was a trial before the court without a jury, a finding for the plaintiff, and a judgment in his favor for $380.50, from which the defendant appeals.

The main contention of appellant is that the court erred in excluding certain offered evidence relating to the

question of fraud. The insurance policy contains a provision that the policy shall be void "in case of any fraud, attempted fraud, or false swearing by the assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss." The evidence tended to prove that appellee's original claim for loss on account of the theft in question included the cost of repairing the top, $130; repainting, $100, and $337 for tires and other items; that at the interview in the agents' office above mentioned, one of the agents told appellee the insurance company had already paid on previous claims for a top that was never replaced, and for repainting which had never been done; and that when these facts were called to appellee's attention, as well as the $60 check sent to Francis, the scene above related occurred.

To prove that appellee was attempting to defraud appellant, appellant offered in evidence two sworn proofs of loss that had been made by appellee, together with appellant's check in payment of such losses, occasioned by alleged thefts of the same automobile occurring only a few months prior to the date of the theft in question. This evidence, if admitted, would have shown, prima facie at least, that appellee, in making his claim for loss and damage on account of the theft in April, 1921, was attempting to collect a second time from the insurance company for certain items of damage to appellee's automobile caused, not by the theft in April, 1921, but by other thefts that occurred months before. The court sustained an objection to this evidence. The evidence was clearly competent upon the issues presented, and it was error to exclude it.

Appellant's counsel asks us to reverse this judgment with a finding of facts, but that cannot be done, for the reason that we cannot make a finding of facts on evidence which was excluded by the trial court, and which, if admitted,

questions of fraud. The Commission feels justified in concluding
that the policies which it said is some of the cases, concerning
fraud, or false statements in the original application are solely due
failure to give information on the subject matter. Further proof
is after a time. The Commission regards it quite not consistent
evidence claim for loss on account of the delay in providing in-
cluded the most of requirements for age, sex, occupation, date,
and place for birth and other claims that in the interests of the
assured' either under certain conditions, or if the assured fail
the insurance company has the liberty only to provide claims the a
ing that was active policies, and for insurance, which has never
been found and that which claim was called in equivalent
attention, as well as the age which has to insure, the amount
above relied assured.

In proof this principle was although, in defense
condition, insurance offices in Canada has been proof of
loss that has been made by insurers, therefore with equivalent
which is proof of such losses, accompanied by clear proof
of the loss insurance company, such a for means claim in the
date of the death in question. This evidence, if insurer, would
have shown, prima facie at least, that a relative, in making the
claim for loss and damage on account of the death in fact, was
not attempting to obtain a benefit from the insurance
company for certain loss of damage in question's economic
cause, not by the death in fact, but by other and be
that concerned another person. The court mentioned an objection
to this evidence. The relation was clearly competent from the
issues presented, and it was proper to evidence it.

Appellant's counsel made an to receive this judgment
with a finding of fraud, but that cannot be done. For the
reason that no cause made a finding of fraud on evidence
which was conducted by the trial court, and which, if admitted,

might, perhaps, be explained by appellee.

The judgment of the Municipal Court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

Barnes, P. J., and Gridley, J., concur.

319 - 28154

A. PLAMONDON MFG. CO., a corporation, Appellee, vs. AMERICAN DIE MOULDED CASTINGS CO., a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On January 6, 1921, plaintiff commenced a first class action in assumpsit against defendant in the Municipal Court of Chicago, claiming a balance due of $7,964.85, for certain castings specially made, sold and delivered to defendant at the latter's request. Attached to the statement of claim is an itemized account claiming the reasonable value of all the castings to be $10,764.85, including an item of $84 for cartage, and showing credits of two cash payments aggregating $3500. Upon a jury trial a verdict for $7,078.85 was rendered in plaintiff's favor. After plaintiff had remitted $84 for cartage judgment was rendered on July 10, 1923, against defendant for $6,994.85, and this appeal followed.

In its amended affidavit of merits defendant, although not denying that the castings were specially made, sold and delivered to it, denies that they were reasonably worth the total sum claimed, and alleges in substance that they were the subject of an express contract whereby plaintiff agreed to manufacture castings for six machines in accordance with blue prints and specifications furnished by defendant and in a good and workmanlike manner, to deliver them within approximately 90 days, and to charge for the same on a time and material basis at the rate of 6 cents per pound for material and not to exceed $1300 per machine.

Defendant also alleges the breach of said express contract, in that some of the castings were improperly constructed, and were not in accordance with the blue prints and specifications, and were worthless, in that all of them were not delivered within 90 days or within a reasonable time; that by reason of said breaches defendant is not indebted to plaintiff in said sum of $7,364.86, or in any sum; and that because of said breaches defendant has been damaged, as shown in its set-off filed, in the total sum of $47,359, made up of loss of orders totalling $45,000 (which it informed plaintiff that it had received at the time it gave its order for said castings, to fill which additional machinery was required and into which machinery said castings were to be assembled), of an over-payment of $2,200 (computed by deducting $1,300, admitted to be due plaintiff for the castings delivered for the first machine, from said $3,500 paid plaintiff on account), of $125 expended by defendant in repairing defective parts in certain castings, and of $34 expended for replacing certain patterns lost by plaintiff. Defendant, in its claim of set-off, also claimed damages in said sum of $47,359, and to this claim plaintiff filed an affidavit of merits.

During the years 1919 and 1920, plaintiff conducted a machine shop and foundry in Chicago and there did machine shop work in gray iron castings. During the months of August, September and October, 1919, Paul Keck, manager of defendant, which was engaged in manufacturing castings by means of a lately patented die moulded casting machine, had several conversations with Charles Amelar and J. T. Benedict, respectively superintendent and president of plaintiff, regarding the making by plaintiff of certain castings for six machines, to be assembled from said castings and to be used in defendant's business. During these months all machine shops in Chicago, including plaintiff's, were very busy, and Keck knew

this. As to what was verbally agreed at these conversations the testimony of the three participants is conflicting. While apparently it was agreed that the castings were to be made in accordance with blue prints, patterns and specifications to be furnished by defendant and were to be charged for on a time and material basis, the charge per pound for the iron, according to Amelar, was to be at the rate of 7 cents, but, according to Keck, at the rate of 6 cents. Keck's testimony, that a maximum charge of $1,300 for the castings for each machine was agreed upon, is directly contradicted by that of Amelar and Benedict, that no maximum price per machine was fixed. And Keck's testimony, that it was agreed that plaintiff would get out enough of the various castings or parts for the assembling of two machines in about six weeks from the time the order was entered and the balance for the four other machines in "approximately" 90 days, is flatly contradicted by that of Amelar, who testified in substance that he informed Keck that plaintiff was very busy, could not give defendant the use of its shop exclusively because of many prior orders, and could only do defendant's work "in between", and that Keck replied that he only wanted to get the parts for one machine in a hurry and as to the remainder plaintiff might take all the time it wanted. On October 20, 1919, following these conversations, defendant sent a written order, signed by Keck in its name, to plaintiff, as follows: "Order No. 225. 10-20-19. To Flemendon Mfg. Co. Please enter our order for 6 machines. You are to furnish castings and mach. them to drawings 6510. Ship all goods and mail invoice to above address." Following this order defendant sent plaintiff a letter, signed by Keck, addressed to plaintiff and dated October 22, 1919, as follows: "The following is an itemized list of castings and forgings we wish for six machines, as per our order #225.- you are to do the machine work only."

this. As to what was verbally agreed at these conversations the testimony of the three participants is conflicting. While apparently it was agreed that the castings were to be made in accordance with blue prints, patterns and specifications to be furnished by defendant and were to be charged for on a time and material basis, the charge per pound for the iron, according to Snyder, was to be at the rate of 7 cents, but, according to Kuck, at the rate of 6 cents. Kuck's testimony, that a maximum charge of $1,000 for the castings for each machine was agreed upon, is directly contradicted by that of Snyder and Magnolia, that no maximum price per machine was fixed. And Kuck's testimony, that it was agreed that plaintiff would get out enough of the various castings or parts for the assembling of one machine in about six weeks from the time the order was placed and the balance for the four other machines in "approximately" 90 days, is flatly contradicted by that of Snyder, who testified in substance that he informed Kuck that plaintiff was very busy, could not give defendant the use of its shop exclusively because of many prior orders, and could only do defendant's work "in between", and that Kuck replied that he only wanted to get the parts for one machine in a hurry and as to the remainder plaintiff might take all the time it wanted. On October 20, 1941, following these conversations, defendant sent a written order, signed by Kuck in its name, to plaintiff, as follows: "Order No. 305, 10-20-41. To Dimension Mfg. Co. Please enter our order for 6 machines. You are to furnish castings and mach. Give us drawings 3700. Ship all goods and mail invoice in every package." Following this order defendant sent plaintiff a letter, signed by Kuck, addressed to plaintiff and dated October 21, 1941, as follows: "The following is an itemized list of castings and forgings we wish for six machines, as per our order #305,- put one in to the machine work only."

Then followed in the letter an itemized list of the patterns (40 in all), of the number of castings wanted from the several patterns for one machine (58 in all), and of the number of castings wanted from the several patterns for the six machines (348 in all). On October 23, 1919, plaintiff, by Benedict, acknowledged receipt of the defendant's order and letter and wrote: "We presume that you are mistaken in your statement that we are to do the machine work only, as it is our understanding that we are to furnish material on the parts that you have listed. Please advise * * . We believe it would be advisable to arrive at a little better understanding with your Mr. Keck, regarding the basis of our charge for this work, and trust that he will find it convenient to call on the writer within the next few days." It will be noticed that neither in defendant's order nor in the letters is any mention made of a maximum price of $1,300, or other sum, for the castings per machine. Pursuant to defendant's order plaintiff entered upon the work of manufacturing the castings in accordance with the blue prints and patterns then and thereafter furnished by defendant, and in accordance with many oral instructions thereafter given by Keck, who, as the evidence discloses, was at plaintiff's shop as many as forty times. The design of the proposed machines was a new one. Many changes were made in the blue prints and patterns and some changes in some of the important parts or castings. Deliveries of castings were made, commencing December 23, 1919, and ending September 11, 1920, by which last mentioned date all the parts contracted to be delivered had been delivered to defendant. All parts necessary for the assembling of one machine were delivered by April 30, 1920. The undisputed evidence shows that 55,677 pounds of gray iron castings were required, and that in machining the castings 3,467-1/2 hours of time were expended by plaintiff's employees. Time sheets, on which also appeared evidence concerning weights, were intro-

duced. And there was evidence showing that the reasonable price for the machine work was $2 per hour. The jury in arriving at their verdict evidently allowed this price per hour, and also allowed 7 cents per pound for the iron in accordance with the price which Amelar testified he quoted to Keck, and made certain deductions for expenditures made by defendant in putting some of the castings into proper condition, etc. Although defendant made complaints as to the condition of certain castings as delivered, it accepted them, and made no attempt to rescind the contract in part until more than 60 days after the final delivery of all the castings.

On September 9, 1920, plaintiff wrote defendant a letter, enclosing a schedule or list of all the parts furnished under defendant's order and the price of each, and showing the total price to be $10,680.85, and a charge of $84 for cartage, and also enumerating in a footnote a few castings still undelivered. In the letter it is stated that said schedule will the better enable defendant to check the bills rendered and satisfy itself as to the reasonableness of the charges; that "you will see by the footnote just what material is still undelivered," which "is completed on our floor and has been for some time, as the condition of the street approaching your factory would not admit of hauling," and which "will go to you this week;" that "we understand that parts 25 and 28 are not planed exactly square, and if you will return these to us we will put them in shape for you without further charge;" and that "our records show that you have paid us $3,500, which leaves a balance due of $7,264.85, and we must ask that you let us have a substantial payment on account at this time." At this time, defendant made no objections as to the amount of plaintiff's charges as set forth in said schedule, or as to the castings as delivered. These objections were first made more than 60 days after the delivery and acceptance of the castings, in defendant's letter to plaintiff, dated November

dated. And there was evidence showing that the reasonable price for the machine was $40 per hour. The jury in arriving at their verdict evidently allowed this price per hour, and then allowed 1 extra per month for the time in controversy when the price which another training was worth to them, and more existing deficiency for experiments made by defendant in putting some of the workings into proper condition, etc. Although defendant made complaints as to the conditions of various machines as delivered, it accepted them, and made no attempt to rescind the contract in part until more than 60 days after the final delivery of all the machines.

On September 8, 1910, plaintiff wrote defendant a letter, enclosing a schedule or list of all the parts furnished under defendant's order and the price of each, and showing the total price to be $10,[illegible]. And a change of this for average, and also enumerating in a footnote a few machines still unshipped. In the letter he is stated that said schedule will the better enable defendant to check the bills received and notify it of or to the accomplishment of the shipment; that "you will see by the footnote just what material is still unshipped," which "is completed on our floor and can be sent for some time, as the condition of the market especially your factory permits not what or machinery" and which "will go on the 15th week;" that "we calculated that parts to 22 and 23 are only plated merely omission, and if you will return them to us we will put them in shape for you without further charge;" and that "our records show that you have paid us $4,800, which leaves a balance due of $7,[illegible],00, and we must ask that you let us have a substantial payment on account at this time." At this time, defendant made no objections as to the amount of plaintiff's charges - not left in said schedule, or as to the workings as delivered. These objections were first made more than 60 days after the delivery and acceptance of the machines, in defendant's letter to plaintiff, dated November

16, 1920, which was evidently carefully prepared, and possibly with the view of making the defense and counter-claim so afterwards made in the present suit. It is stated in the letter in substance that, when the order for the castings for the six machines was given, plaintiff's representatives were "specifically advised" by Mr. Keck that said machines were to be used in getting out orders then in defendant's hands and which could not be filled at all unless said machines were "quickly" assembled; that plaintiff's representatives at the time told Mr. Keck that plaintiff "would get the work out at once," but that it was only after the "greatest urging" by defendant that even "the parts for one machine" were delivered, and those when delivered "in dribs and drabs" were found not to be in accord with the plans and specifications and "had to be machined" by defendant at "considerable" expense to it; that subsequently defendant received "in much the same manner" the parts for another machine, which parts also had to be machined by it to correct the "many errors" made by plaintiff; that now, at the expiration of about one year after the order for the castings was given, plaintiff had furnished defendant "with the parts of four machines," which parts are not in accordance with the blue prints and specifications and "are absolutely no use to us;" that plaintiff waited so long before delivering these machines that defendant has lost a "tremendous amount of actual orders;" that in order to encourage speed in the work "we (defendant) advanced you $3,500, which more than paid for the two complete machines which you furnished us;" and that "we can not see our way clear to accept any of the parts shipped to us on the last four machines, and hereby advise you that we are holding these parts subject to your order." Defendant at this time did not make any attempt to return to plaintiff any of said parts, and upon its subsequent refusals to pay to plaintiff the balance due for the castings the

present action was commenced.

The main contention of counsel for defendant is that the judgment should be reversed and the cause remanded because "the court adopted an erroneous theory of the law covering the case and entirely misconceived the position and contentions of the defendant, resulting in erroneous rulings on the evidence and a set of instructions consistent neither with the law nor the issues." After examining the lengthy abstract of the record and the exhaustive briefs and arguments of respective counsel we are of the opinion that the jury properly found the issues in plaintiff's favor and assessed its damages in the proper amount (except the item of $84 claimed for cartage which was remitted) and that the court properly entered the judgment appealed from. We think that the evidence reasonably tended to prove that the castings were made by plaintiff and delivered to defendant under an agreement between the parties that their price was to be based on material used and labor expended; that the material used was reasonably worth 7 cents per pound and the labor expended $2 per hour; that the castings were made in substantial conformance with the patterns, blue prints, and specifications, supplemented by defendant's oral instructions given by Mr. Keck, and were, under all the facts and circumstances, delivered within a reasonable time; and that defendant retained and used the castings after their delivery and failed to reject them within a reasonable time after inspection. And we think that defendant must be held to have accepted the castings and by such acceptance to have waived any delay in delivery as claimed, and to be liable to pay for the castings, subject to proper deductions by way of recoupment. Certain provisions of the Uniform Sales Act (Cahill's Stat. 1921, Chap. 121a, p. 3043, et seq.) are as follows:

private action was measured.

The main contention of counsel for defendant is that the judgment should be reversed and the case remanded because the court adopted as principal theory of the law governing the case and entirely disregarded the condition and circumstances of the defendant, resulting in erroneous rulings on the evidence and a set of instructions inconsistent and at variance with the law in the issues." After examining the lengthy statement of the reasons and the evidentiary points upon [illegible] of "negligence" [illegible] the court of appeals said: "[illegible] plaintiff's favor and assessed his damages in the proper amount [illegible] the loss of the machine [illegible] and that the court properly entered the judgment appealed from. We think that the evidence reasonably tended to prove that the anything were made by plaintiff and delivered to defendant under an agreement between the parties; that their price was to be based on material used and labor expended; that the material used was reasonably worth 7 cents per pound; the labor expended 17 per hour; that the anything were made in substantial performance of the agreement. The [illegible] evidence, corroborated by defendant's own instructions given by it, [illegible], and more, under all the facts and circumstances, delivered within a reasonable time; and that defendant's failure and refusal to accept the anything after their delivery was failed to inform them within a reasonable time after inspection. And so that the defendant must be held to have accepted the anything and by such acceptance is now estopped from denying in delivery is efficient, and to be liable to pay for the anything, subject to proper deductions by way of recoupment." [illegible] certain provisions of the Uniform Sales Act (Smith's Stat. 1926, chap. 121a, s. 2644, et seq.) are as follows:

§ 41. Seller must deliver and buyer accept goods.) It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract to sell or sale.

§ 47. Right to examine the goods.)(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. * * *

§ 48. What constitutes acceptance.) The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

§ 49. Acceptance does not bar action for damages.) In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefor.

In Conner v. Borland-Grannis Co., 294 Ill. 58, 62, it is said:

"It is a rule of law that if a purchaser desires to rescind a contract of sale and return the article purchased he must offer it back as soon as he discovers the breach or after he has had a reasonable time for examination, and he waives the right to rescind by continuing to use the article for a longer time than is reasonable for a trial and must have recourse to his action for damages in a suit for a breach of warranty or as a defense to a suit for the contract price. (Underwood v. Wolf, 131 Ill. 425; 2 Benjamin on Sales, sec. 1456.)"

And we think it apparent that the jury in assessing plaintiff's damages deducted certain amounts from the balance shown to be due for certain expenditures made by defendant, or as allowances, on account of certain minor defects in some of the castings which had been remedied or could easily be remedied. Even assuming that these defects would have warranted defendant's rescission of the contract and the return of all the castings for the last four machines, its right to rescind was forfeited because the attempt to rescind was not made within a reasonable time, and when made defendant did

§ 61. [illegible]

§ 62. [illegible] (1) [illegible]

§ 63. [illegible]

§ 64. [illegible] The buyer is [illegible]

§ 65. [illegible]

§ 66. [illegible]

In [illegible] v. [illegible], [illegible] 111, [illegible], it is said:

"It is a rule of law that if a previous action in respect of goods and trades the action precedent to most after it such is seen to be elsewhere the [illegible] has had a reasonable case for [illegible], and to [illegible] rights to [illegible] by [illegible] for a longer time than is reasonable for a trial and more reasonable [illegible] action for damages in a suit for a breach of warranty or [illegible] to a defense to a suit for [illegible] price. [illegible] v. [illegible], 133 111. 488; [illegible] on [illegible], sec. 1 (2).

and we think it apparent that the jury in arriving [illegible] tiff's damages [illegible] actual damages from the [illegible] to be the actual expenditures made by [illegible], or to [illegible] an attempt of certain minor [illegible] in some of the [illegible] that been [illegible] or [illegible] to [illegible]. [illegible] these defects would have [illegible] [illegible] of the machinery and the [illegible] of all the [illegible] for the [illegible] machine, the right to revoke was [illegible] because the [illegible] to [illegible] was not much [illegible] a [illegible] size, and [illegible] made [illegible] and

not return or attempt to return said castings. Furthermore, defendant's attempted rescission only relates to the castings for said four machines and not to all. In Maffei v. Ginnechio, 299 Ill. 254, 259, it is said: "The contract must be repudiated in toto or not at all. There cannot be a partial repudiation by the act of only one of the parties."

We do not think that the trial court in its rulings on evidence committed such errors as warrants the reversal of the judgment as claimed. The offered evidence as to the profits that defendant might have made had the castings been delivered at an earlier date was properly excluded (Pennypacker v. Jones, 106 Pa. St. 237, 242; Benton v. Fay, 64 Ill. 417, 423); and the offer was not properly made (Court of Honor v. Dinger, 135 Ill. App. 408, 417; Lucas v. Beebe, 88 Ill. 427, 430.) And we find no prejudicial error in the court's rulings on evidence regarding the correction of certain castings; regarding certain offered letters, time sheets and exhibits (Merlitzer Co. v. Dickinson, 153 Ill. App. 36, 40: Mylie v. Bushnell, 277 Ill. 484, 492; Pittsburg, C. C. & St. L. Ry. Co. v. Chicago, 247 Ill. 178, 192; O'Heron v. American Bridge Co., 177 Ill. App. 405, 409; Heinke v. Sanitary District, 260 Ill. 380, 387); and regarding certain hypothetical questions propounded by plaintiff's attorney.

Defendant's counsel also complain of certain portions of the court's instructions to the jury and also of the court's refusal to give certain written instructions offered by defendant. The court orally instructed the jury. We have read the charge and, viewing it in its entirety, are of the opinion that the jury were fully and fairly instructed. In Zemen v. North American Union, 263 Ill. 304, 313, in referring to a case where the jury were orally instructed, it is said: "It is not expected that it (the charge) will be entirely free from criticism in every particular. Where the jury are charged orally it consists of one continuous

not without an attempt to induce such conclusion. Nevertheless, defendant's attorney persistently made reliance on the proviso for such form conditions and by us did. In Bufkin v. Stevenson, 299 Ill. 388, 132 N.E. 111, it is said: "The conditions must be reasonable in order to exist at all. There cannot be a rational reason for the act of only one of the parties."

We do not think that the trial court in its opinion on evidence concerning such grounds on which the contract of the journeyman on claimed. The effect evidence is to the proviso that defendant might have made but the meaning had delivered to an equally. We particularly contrast (Commonwealth v. Jones, 210 Ky. 487, 2 S.W.2d 1, Bufkin v. Ohio, 14 Ill. App. 1, and the other was not necessarily more (Lewis of Trust v. Chesser, 143 Ill. App. 4, 4th Ill. Ohio v. Smith, 80 Ill. App. 4, 4th.) and we find no prejudicial error in the court's rulings on evidence excluding the operations of matters relating respecting matters affecting liability, time change and contract (Jewelstone Co. v. Lichtman, 320 Ill. App. 4, 4th; Kyle v. Dunnell, 241 Ill. App. 4th; Fleischer, 1. c. 4th E. Co. Co. v. Schwarz, 241 Ill. App. 4th; Kleiner v. Sherman Furniture Co., 237 Ill. App. 4th, 4th; Kaiser v. Hamilton Estate, 240 Ill. App. 4th; and remanding evidence bringing it operations proposed by plaintiff's attorney.

Defendant's counsel also complains of refusal instructions of the court's instructions to the jury and also of the court's refusal to deny certain defense instructions offered by defendant. The court rules which the jury. In some cases the court refused to give certain instructions. Valuing is in its entirety, one of the matters that the jury must fully and fairly instructed. In Jones v. Bright Manufacturing Company, 121 Ill. App. 4th, 4th, in reference to a case where the jury was totally instructed, it is said: "It is not conceived that (the court) will be unmanly from instructions in answer particulars. Since the jury the charged matter is material to resolve at one conclusion.

and connected charge, so that one part will always limit and qualify the other parts, and it is unfair to the court to pick out certain portions of the charge, omitting the other portions which limit and qualify the same, and then insist that the court committed error in its charge to the jury." Furthermore, it does not appear that the portions of the charge here complained of were specifically objected to at the time, which is a prerequisite for the consideration of alleged errors in an oral charge by a reviewing court. (Pecararo v. Malberg, 246 Ill. 95, 97; People v. Berg, 185 Ill. App. 424.) And the court, having fully and fairly instructed the jury in the charge, was justified in refusing to give defendant's offered instructions, even though they may have correctly stated the law. (Morton v. Fusey, 237 Ill. 26, 34; Hukes v. Aaron & Sons, 182 Ill. App. 100, 104.)

Finding no reversible error in the record the judgment of the Municipal Court is affirmed.

AFFIRMED.

Barnes, P. J., and Fitch, J., concur.

[illegible]

and economical change, so that the jury will always limit and modify the effect rules, and it is useful to be every to give out certain portions of the charge, omitting the other portions which limit and modify the same, and then insist that the court [illegible] error in its charge to the jury." Nevertheless, it does not appear that the portions of the charge here complained of were especially objected to at the time, which is a prerequisite for the consideration of alleged errors in an oral charge by a trial[illegible] court. (Lawrence v. Hallenbeck, 144 Ill. 474; Illinois v. Gale, 140 Ill. [illegible], 464.) And the court's action fair and clearly instructed the jury in the charge, was justified in refusing to give [illegible] effect instructions, even though they may have been correctly stated the law. (Chicago v. Kenney, 102 Ill. 351; [illegible] v. [illegible], 112 Ill. [illegible] 324.)

[illegible] Further on [illegible] error is the [illegible] the judgment of the [illegible] court is affirmed.

[illegible]

Carter, J., [illegible] concurring.

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Opinion filed June 20, 1923.

M. M. JONES, Appellee, v. CYRUS H. McCORMICK, HAROLD F. McCORMICK, and STANLEY McCORMICK, as Trustees of the Chicago Stock Exchange Building, Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendants seek to reverse a judgment for $3,142.70, recovered by the plaintiff, in an action of trover in the Superior Court of Cook County.

From the evidence in the record it appears that one, Butler, who was a practicing lawyer in the City of Chicago, occupied certain offices in the Stock Exchange Building, owned by the McCormick Estate, of which the defendants were the trustees. These offices contained certain furnishings, and books constituting a law library, which were the property of Butler. In the summer of 1905, he was in arrears in his rent. He had then been in ill health for some time. He was an old friend of the plaintiff and was in his debt to the extent of $1,000, on a note. About the middle of August, 1905, the plaintiff called to see Butler at his home, at the latter's request and, at that time, according to the testimony of the plaintiff, Butler wrote out and delivered to the plaintiff, a statement reading as follows: "This will certify that M. M. Jones is the sole owner of my law library and ofs. furniture at 529 Stock Exch. Bldg., Chgo, sold to him for $1,000. cancelling

Opinion filed June 20, 1935.

my note of 1-28-03 to be retd. and that I agree to
pay him $60.00 per yr. from 1-28-05 for use of same.
John S. Butler."

Butler died the following December and at that time was in arrears on his office rent to the extent of over $400.00. The agent of the Stock Exchange Building, representing the defendant trustees, was one Kinnehan. A lawyer named O'Neil, with offices in the Stock Exchange Building, also represented the McCormick estate in matters concerning the adjustment of rents between the owners and tenants of the building, when such adjustments became necessary.

Plaintiff testified that he had several talks with Kinnehan and O'Neil, following Butler's death, along in January, and also in February, with reference to his removal of the library and other articles he claimed to own by reason of the document he had received from Butler in August; that they claimed to have a lien on this property, for the unpaid rent, and declined to permit the plaintiff to remove the property unless this rent was paid; that on February 8, 1906, the plaintiff visited the offices Butler had occupied, and at that time all the property was still there; that on the following day, February 9, 1906, in response to a telephone call from a man who had been an office associate of Butler's, Jones again went to the offices and found that all the property in question had been removed, and that he then made formal demand on O'Neil to turn over the property to him, which demand was refused.

The plaintiff instituted this action in trover, February 7, 1911, just before the expiration of the Statute of Limitations, assuming his demand to have been made on February 9, 1906. The testimony submitted in behalf of the defendants was to the effect that the plaintiff's conversations with Kinnehan and O'Neil

my rate of 1-12-13 to be true, and that I agree to
pay him $20.00 per yr. from 1-12-13 for use of room.
John H. Hughes."

Hughes died the following December and at that time
was in arrears on his office rent to the extent of over $400.00.
The event of the usual Kansas Building, containing the im-
portant structure, was one Kingdon. A lawyer named O'Neil, with
offices in the same Masonic Building, also terminated the
month-to-month in matters concerning the adjustment of rents
between the owners and tenants of the building, some such adjust-
ments became necessary.

Minority creditors met at the present table with
Kingdon and O'Neil, following Hughes's death, along in January,
and also in February, with reference to the interest of the library
and other articles be claimed to own by reason of the documents he
had received from Hughes in August, that was claims to have a
lien on this property, for the unpaid rent, and declined to par-
mit the plaintiff to enjoin the property unless this rent was
paid; that on February 8, 1919, the plaintiff visited the offices
Hughes had occupied, and at that time not the property was still
there; that on the following day, February 9, 1919, he received
a telephone call from a man who had been an office occupant
of Hughes's, some again went to the offices and found that all
the property in question had been removed. On that day in the
Fidelity Insurance Co. Hughes's office was broken into, which
door was refixed.

The plaintiff instituted this action in terms, Janua-
ry 7, 1919, just before the expiration of the statute of limita-
tions, according the claims to have been made of February 7, 1919.
The testimony submitted in behalf of the defendants was to the
effect that the plaintiff's conversations with Kingdon and O'Neil

and also his formal demand on the latter, occurred early in January and not in February, as the plaintiff had testified. The defendants filed a general plea to the plaintiff's declaration and also a special plea, setting up the Statute of Limitations. The trial resulted in a verdict for the plaintiff and judgment was entered accordingly.

It is, of course, true, as the plaintiff contends, that if this property belonged to the plaintiff, and defendants' agents took possession of it without any right to do so; and the plaintiff's demand for its return has never been complied with, the defendants would be liable for its value in an action in trover, provided such action was brought within the period of the statute. In our opinion there was no foundation for the contention of the defendants, that the instrument on which the plaintiff bases his right to the property, being the one quoted above, amounts to a chattel mortgage. On its face, it purports to convey to the plaintiff the complete title to Butler's library and other chattels located in his law office, and further, to provide that Butler was to retain possession of it and have the use of it, paying the plaintiff $60.00 a year therefor.

But, the defendants contend that a sale of personal property without a transfer of possession, is fraudulent per se, as to the vendor's creditors, citing Johnston v. Halloway, 82 Ill. 334 and other cases, in all of which the creditors involved, were judgment creditors. Where there is an unrecorded chattel mortgage, the mortgagor retaining possession of the mortgaged property, the transaction cannot hold good as against creditors. "But, by 'creditors' is meant, not general creditors or creditors at large, and only such creditors as are armed with an execution or writ of attachment, or other process of court, are regarded as

and also his factual claims on the issue, answering only in law-
many and not in fact, as the plaintiff had insisted. The
defendants filed a general plea to the plaintiff's contentions
and also a special plea, arising in the nature of limitations.
The trial resulted in a verdict for the plaintiff and judgment
was entered accordingly.

It is, of course, true, as the plaintiff contends,
that if this previous judgment is its liability, and defendants'
should look possession of it without any right to do so; and the
plaintiff's demand for the return has after been complied with,
the defendants would be liable for the value in an action for
trover, provided that action was brought within the period of
the statute. In our problem there was no foundation for the con-
tention of the defendants, that the instrument on which the plain-
tiff bases his right to the property, being the one quoted above,
amounts to a mortgage overdue. In the case, it purports to convey
to the plaintiff the complete title in McCarter Library and which
originally belonged to his law office. The further, in passing that
action was to retain possession of it and have the use of it, pay-
ing the plaintiff $50.00 a year therefor.

But, the defendants contend that a sale of personal
property without a transfer of possession, is fraudulent and void
as to the vendor's creditors, citing Lindsay v. Williams, 24
Ill. 274 and other cases, in all of which the circumstances involved
were highway robbers. Where there is no concealed chattel
mortgage, the mortgagor retaining possession of the mortgaged pro-
perty, the transaction cannot hold good as against creditors.
That, by 'creditors' is meant, not general creditors of creditors
at large, and only such creditors as are armed with an execution
or writ of attachment, or other process of court, are referred to

'creditors' in the sense that they are authorized to impeach a conveyance or transfer of property by their debtors for fraud, or question the validity of an equitable lien on personal property that is good as against such debtors themselves, and their heirs, executors, administrators and voluntary assignees." Union Trust Co. v. Trumbull, 137 Ill. 146, 180. The same thing is true, where instead of a chattel mortgage there is a conditional sale, and possession remains with the seller.

Under the evidence, the defendants are not judgment creditors, nor did they have any lien against this personal property. They admit that the terms of Butler's lease gave them no right to seize the property merely because he was in arrears in his rent. The only possible basis for their claimed right to take possesion of the property, is to be found in the testimony of one, Dittus, to the effect that he was present on an occasion about the middle of January 1906, when the plaintiff had a talk with O'Neil, at which time he testified, O'Neil told the plaintiff that defendants "had a claim for rent for which they claimed a lien on the library in the way of a verbal chattel mortgage, and that by arrangement between Mr. Butler and the building, the library was to stand as security for the rent as it accrued." Of course, this testimony falls far short of establishing the defendants', as lien creditors of Butler. It merely recites a conversation in which the defendants' agent purports to tell the plaintiff the position he claimed to occupy with regard to the property in question.

Section 25 of the Uniform Sales Act, Ill. Sts. ch. 121a Sec. 29 (J.& A. par. 1021) provides that "where a person, having sold goods, continues in possession of the goods, or of negotiable documents of title to the goods, and such retention

'prudential' in the sense that they are motivated to impede a monopoly or increase at present by just cause the trust, or question the validity of an equitable lien on personal property that is used as a[illegible] such action immediately, see Hunter Dairy Co. v. Kingsbell, 247 ill. 180, 190. The same thing is true, where instead of a mutual mortgage there is a purely [illegible] sale, and transaction results with the seller.

Under the circumstances, the defendants are not justified, nor did they have any lien against such personal property. They could not be sure of [illegible]. Indeed, [illegible] right to seize the property merely because he was in arrears in his rent. The only possible basis for their claim of right to take possession of the property, i. to be found in the testimony of one, Hilton, to the effect that he was present on an occasion about the middle of January 1922, when the plaintiff had a talk with O'Neil, in which [illegible] O'Neil said the plaintiff that Schwartz "had a claim for rent for which they claimed a lien on the library in the way of a verbal chattel mortgage, and that by arrangement between Mr. Hilton and the mailman, the library was to stand as security for the rent as it accrued." Mr. Hilton, testimony fails the court of substantiating the [illegible] claim possession of Hilton. It merely [illegible] a [illegible] which the defendants' [illegible] property is not the plaintiff the position to claim to secure with respect to the property in question.

Section 69 of the Uniform Sales Act, Ill. Ann. Ill. Rev. Sta (J.S.A. par. 3008) provides that "where a person having with power, consents to possession of the goods, or of negotiable documents of title to the goods, and such possession

of possession is fraudulent in fact, or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void." In our opinion, Butler's retention of the property sold to the plaintiff may not be deemed fraudulent per se, under any rule of law unless it be as to judgment creditors or creditors possessing a writ of attachment or other form of lien against the property. Of course the sale and Butler's retention of the property might be shown to have been fraudulent, in fact, and the question of whether or not it was, would be a question of fact for the determination of the jury.

There are procedural errors in the record which necessitate another trial of this case. At the request of the plaintiff the court gave the jury an instruction reading as follows: "If you believe from the evidence that the plaintiff was the owner of the property with the right to immediate possession at the time of the alleged conversion, and that the defendants wrongfully converted the property in question to their own use, then the jury should find for the plaintiff and against the defendants." This was a mandatory instruction. It entirely ignored the defense raised by the defendants' special plea, involving the question of whether the plaintiff's cause of action had arisen within the period of the Statute of Limitations. This instruction being mandatory, it cannot be helped or supplemented by any other instructions that the court may have given. The giving of this instruction was reversible error. International Bank v. Bartlett, 11 Ill. App. 620; Ferdridge v. Butler, 168 Ill. 504; Montgomery Coal Co. v. Haringer, 218 Ill. 327; Mooney, Admr. v. City of Chicago, 239 Ill. 414.

of possession in Frankland in fact, or in course Frankland under any rule of law, a creditor or purchaser of the seller may treat the sale as void." In our question, Smiley's retention of the property paid in the plaintiff may not be deemed fraudulent per se, under any rule of law unless it be on judgment creditors or creditors possessing a mode of attachment or other form of lien against the property. If neither the sale and Smiley's retention of the property might be shown to have been fraudulent, in fact, upon the question of whether or not it was, while he is satisfied of fact for the determination of the jury.

There are procedural errors in the trial which necessitate another trial of this case. At the request of the plaintiff the court gave the jury an instructive pending as follows: "If you believe from the evidence that the plaintiff was the owner of the property with its right to possession upon as the time of the alleged conversion, and that the defendants wrongfully converted the property in question to their own use, then the jury should find for the plaintiff and against the defendants." This was a mandatory instruction. It wrongfully ignored the defense raised by the defendant crucial item, leaving the question of whether the plaintiff's cause of action had accrued within the period of the statute of limitations. This instruction being mandatory, it cannot be taken or explained by any other instructions that the court may have given. The giving of this instruction was reversible error. Independent Sand v. Burlington, 11 Ill. App. 620; Pendleton v. Tuttle, 160 Ill. 304; Southern Ill. Co. v. Barnhart, 214 Ill. 217; Chicago, City of Chicago, 200 Ill. 414.

While testifying in his case inchief, the plaintiff stated that he visited Butler's offices on February 8, 1906, in the afternoon and talked with one Moore, who occupied one of the offices, and that on that occasion he noticed that the library and furniture were all there; that on the following day, February 9, pursuant to a telephone call from Moore, he again went to the offices and on this occasion found that all the property had been removed, and he immediately went to see Kinnehan about it and the latter referred him to O'Neil; and upon visiting the latter the plaintiff testified, he made a demand for the return of the property. After witnesses for the defendants had testified that this demand was made in January the plaintiff took the witness stand in rebuttal, and in the course of his testimony his counsel asked "What refreshes your memory as to that date, as to when that library was taken out?" Over objection of defendants, the plaintiff was permitted to answer that when he called at Butler's offices on the morning of February 9, he observed all the library and books had been taken out and he then proceeded to testify, "I took out my pen and marked the date right on my schedule, on the list, and here it is. (Indicating) That is the original list which is in evidence. I wrote it at that time." Counsel then offered this written memorandum on the back of the plaintiff's list of articles contained in Butler's offices, and, over objection by counsel for defendants, the memorandum was admitted in evidence. This memorandum read as follows: "Library moved from 525 night of February 8 - 06." The defendants' objection to the introduction of this memorandum should have been sustained. A memorandum used as a record of past recollection may be introduced in evidence by the party using it, 1 Wigmore on Evidence, Paragraph 734; Koch v. Pearson, 219 Ill. App. 468, but where a witness has a present recollection to the

While investigating in his usual fashion, the plaintiff stated that he visited Miller's office on February 8, 1966. In the afternoon one Daley came into court. He requested use of limousines, and then on that occasion he noticed that the library and furniture were all there; some on the following day, February 9, pursuant to a telephone call from Moore, he again went to the office and on this occasion found that all the property had been removed, and he immediately took to see Kimmelman where it was and he later retrieved him to O'Neil; and upon visiting the Daley the plaintiff testify, he made a demand for the return of the property. Other witnesses for the defendants had testified that this demand was made in June; only the plaintiff said the witness stand in rebuttal, and in the course of his testimony he stated that between June and August 1966 he had made a demand for the return of the property on the same date, on to whom that library was taken away? Over objection of defendants, the plaintiff was permitted to answer that when he called at Miller's office on the morning of February 9, he observed all the library and books had been taken out and he then proceeded to testify, "I took out my pen and marked the date right on my schedule, on the list, and here it is. (Indicating) That is the original list which is in evidence. I made it at that time." Counsel then offered this original memorandum on the back of the plaintiff's list of articles contained in Miller's office, and, over objection by counsel for defendants, the memorandum was admitted in evidence. This memorandum read as follows: "Library moved from BBB night of February 8 - 9." The defendants' objection to the introduction of this memorandum should have been sustained. A memorandum used as a record of past recollection may be introduced in evidence by the party using it, 2 Vignera on Evidence, Hornbook 786; Kent v. Peterson, 210 Ill. App. 486, but where a witness has a present recollection as to

effect that a given occurrence happened on a certain date, and that present recollection is revived or refreshed by some memorandum, the party so using the memorandum has not the right to treat it as evidence or to have it received in evidence. 1 Wigmore on Evidence, Par. 763. Counsel for plaintiff seems to contend in his brief that this notation which the plaintiff testified he had made, was admissible not as a memorandum but as "original evidence", to the effect that the notation in question had occurred as stated in the notation. Of course this is not the case. Considered as so-called original evidence, it was merely a self serving declaration which would not be admissible unless it came within some of the exceptions to the general rule that makes such declarations inadmissible. Moreover, counsel's examination of the plaintiff at the time this notation was offered in evidence, shows that he was endeavoring to bring it within one of the exceptions and that he was treating it as a memorandum used to refresh the plaintiff's recollection, for immediately preceding the offer of this memorandum he asked the plaintiff "What refreshes your memory as to that date?" The plaintiff had previously indicated that he was testifying from a present recollection of the date, and even in his testimony on rebuttal he continued to maintain that position. In that situation, the notation itself was not competent evidence. It was plainly not used as a memorandum of past recollection, but was used in connection with a present recollection.

Although the ad damnum laid by the plaintiff in his declaration, was $3,000, the judgment recovered was in excess of that amount. The plaintiff has made a motion in this court, asking leave to file a remittitur for the amount of such excess. If, in other respects, the record was such as to permit the affirmance of the judgment, we would allow the motion. But, inasmuch

as we find it necessary to reverse the judgment and remand the cause, for the other reasons to which we have referred, the motion cannot be allowed. While the motion is denied, the fact that the judgment exceeds the *ad damnum*, does not affect our decision of the case.

For the reasons stated the judgment of the Superior Court is reversed and the cause is remanded to that court for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

Opinion filed June 20, 1923.

248 - 27724

EDWARD MIDDLETON COMPANY, a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
FRANCIS M. BARTON, Appellant.	

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff filed its statement of claim for materials furnished and labor performed in connection with the lathing and plastering of a building belonging to the defendant, setting out the contract price of the work which it alleged it had done in accordance with the plans and specifications prepared by the defendant, who was an architect, and also giving the amount of some extras which the plaintiff claimed were involved, and the plaintiff also set forth in the statement of claim, certain payments which had been made and that after deducting these there was a balance of $529.84 which plaintiff contended was due on this work and the plaintiff further claimed interest on that amount at five per cent from September 14, 1918.

By his affidavit of merits the defendant denied that the plaintiff had performed the work according to the plans and specifications, but alleged that he had failed to do so; that inferior materials had been used and the work had been performed improperly so that parts of it had fallen down and the defendant had been to great expense making repairs although, the de-

Opinion filed June 20, 1921.

JAS - LVIIA

EDWARD PRESTON DOUGLAS, a minor,	
Appellee,	
	Appeal from
	Contribution Court
To	
	Mr. Justice.
FRANCIS C. BRUCKER,	
Appellant.	

Mr. Justice Thomas delivered the opinion of the tribunal:

This plaintiff filed his statement of claim for materials furnished and labor performed in connection with the laying and plastering of a building belonging to the defendant, setting out the contract price of the work which it alleged it had done in accordance with the plans and specifications prepared by the defendant, who was an architect, and also giving the amount of some extras which the plaintiff claimed were included. The defendant admitted that the work was done and that certain payments which had been made had been made after deducting from them a balance of $200.00 which plaintiff contended was due on this work and the plaintiff further claimed interest on that amount at five per cent from September 15, 1919.

By his affidavit of merits the defendant denied that the plaintiff had performed the work according to the plans and specifications, but alleged that he had failed to do so; that inferior materials had been used and the work had been performed improperly in that parts of it had fallen down and the balance had been in great worse condition although the defendant had paid the plaintiff the

fendant alleged he had notified the plaintiff of these defects and that the plaintiff had promised to remedy them but had failed to do so. The defendant further alleged in his affidavit of merits that in addition to the amounts paid on account of this work, as shown in the statement of claim, "the plaintiff received on the account sued on, the sum of $250 * ** although said payment was not made by defendant nor by anyone thereunto by him authorized."

The issues were submitted to a jury and a verdict returned in favor of the plaintiff for the amount sued for,- $529.34. On the motion for a new trial the court took the position that there had been an account stated between the parties on October 11, 1917, for $500.00 and that the defendant was entitled to credit for a payment of $250.00, thereafter made to the plaintiff by one Guyon, in connection with this account; that at the time of the account stated, the parties had agreed that $500.00 was the balance due and that, therefore, the plaintiff was entitled to a judgment for the part remaining after crediting the $250.00 payment of Guyon, namely $250.00, together with interest on the latter amount and the court announced that if the plaintiff was willing to take a judgment for $250.00 and interest, such a judgment would be entered, but if not, the motion for a new trial would be allowed. The plaintiff thereupon elected to enter a remittitur as the court had suggested and accordingly the motion was overruled and judgment was entered for the plaintiff for $314.00. To reverse that judgment the defendant has perfected this appeal.

It appears from the evidence in the record that the plaintiff undertook to do the work of lathing and plastering an apartment building owned by the defendant, for a stipulated

Counsel alleged he had notified the plaintiff of these matters and that the plaintiff had promised to remedy them but failed to do so. The defendant further relied on the affidavit of Monita Blue in addition to the accounts, and on receipt of this work, as shown in the statement of claim, "the plaintiff received on the accounts sued on, the sum of $200 - - - without said payments was not made by cheque nor by express instructions by him authorized."

The issues were submitted to a jury and a verdict returned in favor of the plaintiff for the amount sued for, $[illegible]. On the motion for a new trial the court took the position that there had been no amounts owing between the parties on October 11, 1917, for $[illegible] and that the defendant was entitled to credit for a payment of $[illegible], therefrom and to the plaintiff by one Dunn, it transpired with this account, that at the time of the account sales, the parties had agreed that $[illegible] was his income due him last, therefore, the plaintiff was entitled to a judgment for the part remaining after crediting the $[illegible] payment of Dunn, namely $[illegible], together with interest on the latter amount and the court announced that if the plaintiff was willing to take a judgment for $[illegible] and interest, such a judgment would be entered, but if not, the motion for a new trial would be allowed. The plaintiff thereupon elected to enter a remittitur as the court had suggested and accordingly the motion was overruled and judgment was entered for the plaintiff for $[illegible]. It appears that Dunn's the defendant had intervened this record.

It appears from the evidence in the record that the plaintiff undertook to do the work of letting and plastering an apartment building owned by the defendant, for a stipulated

price. This work was begun some time in June, 1916, and finished in September of that year. A payment was made on account by the defendant in August and two payments were made in September. After these payments were made, a balance was left due and owing to the plaintiff but no further payments were apparently made until October, 1917, when under date of October 11, the defendant gave the plaintiff his check for $200.00, on which there is a notation written by the defendant reading as follows: "$200.00 on a/c. Balance $500.00".

There is a good deal of evidence in the record about the subsequent payment of $250.00, made to the plaintiff by Guyon. The latter owned a large dance hall or pavilion in connection with which he was constructing an addition, in 1918. The plastering contractors on that work were McMulty Brothers. It seems that while the plastering work was being done on the addition to Guyon's pavilion, the work was suddenly stopped, and upon investigation, Guyon discovered that this was due to the fact that the defendant, Barton, who was the architect in connection with the work of constructing the dance pavilion addition, owed the plaintiff $500.00 on this old account; that the plaintiff had turned this account over to the Employing Plasters' Association and apparently in order to help the plaintiff collect this debt from the defendant, Barton, the Association had required McMulty Brothers to hold up, the plasteringwork on the Guyon job, on which Barton was the architect. Guyon claimed that this was going to result in a big loss to him and apparently, from the testimony in the record, Guyon tried to get Barton to pay his bills so that the work on his pavilion could proceed, but this was not done and finally, according to the testimony of one Middleton, for the plaintiff, Guyon paid $250.00 for Barton on the account sued on in the case at bar, and guaranteed the payment

price. This work was begun some time in June, 1919, and finished in September of that year. A payment was made on account by the defendants in August and two payments were made in September. After these payments were made, a balance was left due and owing to the plaintiff for the further payments were immediately made until October, 1919, when which date of October 13, the defendants gave the plaintiff his notes for $[illegible], in which there is a balance written by the defendants reading as follows: "$[illegible] on a/c. Balance $[illegible]".

There is a good deal of evidence in the record about the alleged payment of $[illegible], which is the plaintiff's claim. The latter proved a large number of payments in accordance with which he was necessitating on account, in 1918. The plaintiff testified in that work was completed. It was not until the defendant's position, the work was reasonably worthy. Not upon investigation, Burden, who was the architect in accordance with the work of constructing the house described matters, and testified that $[illegible] on his own particular matters; that the plaintiff had taken this account over to the defendant Charters' foreman and apparently in order to help the plaintiff unless this date from the defendant, Burden, the foreman had required nothing further to help us, the plastering on the upper jaw, as which Burden was the architect. Mayer claimed that this was going to result in a big loss to him and apparently, from the testimony in the record, Mayer tried to use Burden to pay his bills as that the work on his building could proceed, but this was not done and finally, according to the testimony of one Middleman, for the plaintiff, Mayer paid $[illegible] for Burden on his account and on it the case at bar, and guaranteed the payment

of the balance, amounting to $250.00. Guyon testified that he gave the plaintiff a note for the balance and then his work proceeded.

The defendant contends that the verdict is against the manifest weight of the evidence, in that there was no contradiction of the fact that the work done by the plaintiff was defective. In our opinion the record does not bear out that contention. Middleton testified that the defendant never made any complaint to the plaintiff about the ceilings cracking or falling, but that about three years after the completion of the work the defendant had made some complaint to one Riley, manager of the Employing Plasterers' Association, and Riley had told the witness about it. This was after the plaintiff had received the $250.00 payment from Guyon. There was some testimony by a tenant of the defendant and his janitor and a painter, to show that some of the work involved in the contract in question had proven defective. Barton testified that after the work done by the plaintiff was completed it looked all right but that two or three months later cracks began appearing and these became worse and finally, in the fall of 1917, a ceiling fell down and that they had been falling down ever since. He further testified that when he gave the plaintiff the $200.00 check in October, 1917, he discussed this matter with the plaintiff and he agreed to return to the job and patch or replace any ceilings that needed it and the defendant says that he then told the plaintiff that after "he (Middleton) had gone ahead and got the building in shape, that he would then pay him the $500." We cannot say that the finding of the jury on this conflicting evidence was such that this court would be warranted in setting it aside. The defendant's testimony is certainly quite inconsistent with the notation he put

of the balance, amounting to $[illegible]. Upon satisfying also on gave the plaintiff a note for the balance and then his work proceeded.

The defendant maintains that the visits in question the municipal works of the citizens, in which he was in conversation of the fact that his work was done by the plaintiff was delivered. In our opinion the evidence does not bear out that contention. Nicholson testified that the defendant never made any complaint to the plaintiff about the building crashing or falling, but that about three weeks after the completion of the work the defendant had much more complaint to see Kiley, manager of the Dominion Plasterers' association, and Kiley had told the witness about it. This was after the plaintiff had received the $[illegible] from Lyons. Kiley was also testimony by a member of the defendant and the plaintiff was a painter, so when that sort of the work involves in the contract in question and proper defendant. Nicholson testified that after the work done by the plaintiff was completed it looked all right but then in a little while later about eight days after the stone became worse and finally, in the fall of 1917, a ceiling fell down and that they had been falling down ever since. He further testified that when he gave the plaintiff the $[illegible] note in October, 1917, he discussed this matter with the plaintiff and he agreed to return to the job and make or replace any ceiling that needed it and the defendant says that he was told the plaintiff had given the [illegible] had gone about and put the building in shape, that he would then pay him the $[illegible]. He admits by cross-examination that the defendant witness was such that his evidence should be carefully weighed. The defendant's business is certainly quite inconsistent with the evidence in the building in question.

on the $200.00 check he gave the plaintiff in October, 1917.

We shall make no further reference to the facts recited above involving the payment that was made to the plaintiff by Guyon. The trial court held that the defendant was entitled to have that payment credited on this bill and that would seem to be clear from the evidence. After crediting that payment on the balance of $500.00 there was an equal amount of $250.00 remaining due. That amount was still owing from the defendant to the plaintiff. This fact was not affected in any way by the fact that the methods which were used on the Guyon job were so used.

The defendant contends that the trial court erred in requiring the plaintiff to remit and in entering a judgment on the theory of an account stated, as the suit had not been brought by the plaintiff on that theory. In our opinion, this contention is not tenable. This was an action of the fourth class in the Municipal Court, where formal written pleadings are not required. The giving of the $200.00 check by the defendant to the plaintiff in October, 1917, with a notation written on it by the defendant to the effect that his payment was on account, leaving a balance due of $500.00, and its acceptance by the plaintiff, in that form, was, in effect, the stating of the account.

We are further of the opinion that under all the circumstances the trial court did not err in allowing interest.

We find no error inthe record and therefore the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

as the $800.00 stand on into the plaintiff in error, and.

We shall note no further reference to the facts recited above leaving the reader to see for himself by reason. The main point will that the defendant was entitled to have that original instruction on the ground that would have to be given for instance. After considering the evidence in the record we find there was no equal amount of fair or insufficient. That amount was still owing from the defendant to the plaintiff. The fact was not affected in any way by the fact that the machine which were used on the repair job were of used.

The defendant contends that the trial court erred in requiring the plaintiff to make and in entering a judgment on the theory of an account stated, as the suit had not been brought by the plaintiff on that theory. In our opinion, this contention is not tenable. This was an action of the fourth class in the municipal court, where formal written pleadings are not required. The filing of the $800.00 check by the defendant to the plaintiff in October, 1917, with a notation written on it by the defendant to the effect that his payment was on account, leaving a balance due of $800.00, and its acceptance by the plaintiff, in that form, was, in effect, the rendering of an account.

We are fortune at the question that under all the circumstances the trial court did not err in entering judgment.

We find no error in the record and therefore the judgment of the municipal court is affirmed.

AFFIRMED.

TATLOR and ATKINSON, JJ., concur.

Opinion filed June 20, 1923.

269 - 27745

H. S. SIEGEL & COMPANY, a corporation, Appellant,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
FRANK GORDON, Appellee.	

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

This is an appeal by the plaintiff, H. S. Siegel & Company, from an order of the Municipal Court of Chicago, vacating a judgment which had been entered in favor of the plaintiff and against the defendant, Frank Gordon, in a case of the first class, for the sum of $2373.43.

The plaintiff filed its statement of claim on June 15, 1921. The first summons which was issued was returned, not found. An alias summons was then issued, returnable July 11, 1921, and that summons was served on the defendant June 30, 1921. On July 11, 1921, the defendant filed his appearance, together with a demand for a jury trial. On July 14, the defendant made a motion to strike the plaintiff's statement of claim, which motion was, on that date, overruled. Under the rules and practice of the Municipal Court, this case regularly came up on July 19, for the filing of the defendant's affidavit of merits. On that date, the plaintiff being represented in court, by its counsel, the defendant moved the court for an extension of time within which to file his affidavit of merits. In connection with this

motion, the record shows that on the day last referred to, the court entered the following order, "On motion of the defendant, it is ordered by the court that the time to file affidavit of merits be and it is hereby extended, ten (10) days." On the same date the court postponed the case and set it for August 1, 1921, according to the record. On the latter date no affidavit of merits having been filed, the defendant was defaulted and the Municipal Court entered a finding and judgment against the defendant for want of an affidavit of merits. On August 3, 1921, the defendant filed his affidavit of merits. It appears from the record that shortly thereafter, counsel for plaintiff secured an execution from the office of the clerk of the Municipal Court on this judgment. A few days later he went away on his summer vacation, returning in the latter part of September. He then delivered the execution to the bailiff of the Municipal Court, and , on October 4, the bailiff made a demand on the defendant under this execution. On October 10, the defendant filed a petition seeking to vacate the judgment of August 1. In due time the plaintiff filed an answer to the petition and on the issues made up on the petition and answer thereto, a hearing was had on December 3, 1921, at the conclusion of which the court entered an order vacating the judgment, to reverse which the plaintiff has perfected this appeal.

In connection with this hearing the court heard oral testimony submitted by both the defendant, in support of his petition, and the plaintiff in opposition to it. In support of the petition, one Carolan testified that he was a law student employed by counsel for the defendant as a clerk; that on July 19, he appeared in the Municipal Court in connection with this

case, it being the return day of the case, and that someone appeared the same day, representing the plaintiff. The witness indicated one Schwartz, therein the courtroom, as the one who had appeared for the plaintiff, although he said he was not certain that Schwartz was the man.

Over plaintiff's objection, the witness testified that when the case was called in court, on July 19, he asked the court for 20 days within which to file defendant's affidavit of merits; that the representative of the plaintiff suggested that defendant be required to file his affidavit of merits instanter; that the witness then stated that under the rules they were entitled to 10 days; and that the judge also commented on that rule and continuing, said, "15 days in which to file an affidavit of merits"; that nothing further was said by either of the parties representing the litigants or by the judge; that the witness thereupon returned to the office of counsel for the defendant and entered a notation in the office diary, under date of August 3, giving the title of this case and adding, "Our affidavit of merits due." In connection with this testimony, the witness detailed considerable conversation which occurred in connection with the making of this motion on July 19, between himself and Mr. Schwartz and the presiding judge. The witness also testified to the effect that he called the attention of one Caldwell, a member of the firm of lawyers who represented the defendant, to the fact that the affidavit of merits in this case was due on August 3. One, Jacker, testified that he received the defendant's affidavit of merits from Caldwell and filed it on August 3. Caldwell testified that at the time the defendant's motion to strike the plaintiff's affidavit of claim was overruled, he had started to prepare the

defendant's affidavit of merits; that this preparation was later concluded and he gave it to Jacker to file on August 3, having received a memorandum from Carolan to the effect that the affidavit was due on that date. Over plaintiff's objection, this witness further testified to a conversation he had over the telephone with counsel for the plaintiff in October, relative to the entering of judgment, asking the plaintiff's counsel to consent to have the judgment set aside, and that he declined to consider it. Defendant then introduced the files of the Municipal Court covering the case, and also certain rules of the court, and rested.

In opposition to the petition, Schwartz testified for the plaintiff, that he was a clerk in the employ of counsel for the plaintiff and that on July 19, he did not appear in the Municipal court, but was absent from the city on his vacation, and he was corroborated in this matter by two other witnesses who were companions of his on that vacation trip. One, Michoff, a deputy clerk of the Municipal court, testified that he had acted in that capacity for some 15 years and that he had been a minute clerk in the court room, in which this case was called on July 19, for about 11 years; that he was acting in that court in that capacity on July 19; that the record of the entries made in this case, on that date, were in his hand writing and that they were correct; that this record showed, in connection with this case, the item "A. M. 10 days", which in his minutes meant, "Motion of defendant time to file affidavit of merits extended 10 days"; that this entry was made at the time and was supposed to be just as the judge gave it. On cross-examination he testified that he had no independent recollection of this particular case; that it was possible that an error might have been made, but, to the best

defendant's affidavit of service that the [illegible] on [illegible] July 3, having received a memorandum from Dayton to the effect that the affidavit was in his own handwriting. [illegible] such statement further in a memorandum to the effect the witness will [illegible] to the matter of Dayton, making the affidavit's content to [illegible] to have the judgment [illegible] that he replied to [illegible] 18. Defendants were introduced the time of the [illegible] that there [illegible] the same, [illegible] of the [illegible], and [illegible].

In opposition to the petition, defendants submitted for the plaintiff, that he was a clerk in the employ of [illegible] for the plaintiff was there on July 30, on the [illegible] in the municipal court, he was absent [illegible] on his business, and he was corroborated in this [illegible] by the other witnesses who were complainants of his on that [illegible]. Then, finally, a deputy clerk of the municipal court, testified that on the [illegible] in that capacity he was in [illegible] that he was [illegible] the clerk in the court room, in which case he [illegible] on July 30, for about 15 years; that he was [illegible] in that court [illegible] July 18; that the remarks of the witness [illegible] in this case, on that date, were in his own writing and that they were correct; that this record showed, in connection with this case, the item "a. 5, 10 days", which in his minutes means, "Motion of defendant time in file affidavit of merits extended 10 days"; that this entry was made at the time and was [illegible] in the [illegible] as the judge gave it. On cross-examination he testified that he had no independent recollection of this particular case; that it was possible that an error might have been made, but, in the best

of his recollection, the record as made stated the truth.

The plaintiff then rested and by way of rebuttal the defendant called one, Morris, counsel for the plaintiff, to the stand and asked him who attended on the call of this case in the Municipal Court on July 19, and Morris answered that he did. Not being interrogated further, Morris proceeded to state, by way of cross-examination of himself, that the order stated by the judge on July 19, was for 10 days. This was objected to as not cross examination, and objection was sustained.

Section 21 of the Municipal Court Act, Illinois Statutes, ch. 37, provides that if no motion shall be entered to vacate, set aside, or modify any judgment of the Municipal court within 30 days after such judgment is entered, "the same shall not be vacated, set aside or modified except upon appeal or writ of error, or by a bill in equity, or by a petition to said Municipal court setting forth grounds for vacating, setting aside or modifying the same, which would be sufficient to cause the same to be vacated, set aside or modified by a bill in equity; provided, however, that all errors in fact in the proceedings in such case, which might have been corrected at common law by the writ of error coram nobis, may be corrected by motion, or the judgment may be set aside, in the manner provided by law for similar cases in the circuit court." The petition filed by the defendant, pursuant to which the trial court entered the order appealed from, was one filed under this section.

In the briefs filed in this court, both parties treat the petition filed by the defendant as one in the nature of a bill in equity, seeking to have the judgment entered in favor of the plaintiff set aside, on the equitable grounds therein set forth

by the petitioner. If, in fact, when the parties were in court on July 19, the court ordered that the defendant might have 15 days to file his affidavit of merits and if, in fact, the clerk made a mistake in recording that order, as one giving the defendant 10 days within which to file his affidavit of merits, there would seem to be such an equitable situation as would demand that the defendant be given relief as prayed for, in the petition, provided he therein sets up a good defense to the plaintiff's claim and also sets up facts showing that he was not guilty of negligence in connection with the default judgment which was entered against him. Equity has jurisdiction to set aside a judgment at law where such judgment has been obtained by fraud, accident or mistake. Foote v. Despain, 87 Ill. 48; Prussian Natl. Ins. Co. v. Chiecky, 94 Ill. App. 168. In the case last cited the mistake alleged was a clerk's recital as shown in the record. In holding that one, by bill in equity, might obtain relief against a judgment obtained as a result of such a mistake, and that in support of such a bill one might introduce oral testimony against the truth of the recital alleged to have been a mistake, the court referred to Owens v. Hanstead, 22 Ill. 161, where the mistake alleged was a sheriff's return and where it was held that oral testimony was admissible against the truth of such return, the court saying, "a court of equity has full power and jurisdiction to interpose and give the appropriate relief, and to permit the party injured to aver against the truth of the return and show it to be false, although it is a matter of record."

If the facts were as alleged by the defendant in his petition and as the proof submitted by the defendant tended to show, it may not be said that the defendant was guilty of any

by the petitioner. If, in fact, when the trial was in court on July 19, the court erroned and the defendant had done in his own affidavit or merits and if, in fact, the court made a mistake in convicting that other, or not giving the defendant 30 days within which to file an affidavit of merits, there would seem to be also an equitable solution or would the court find that the defendant be right entitled to prevail for, on the petition, provided he convince even by a preponderance of the plaintiff's claim and also by good evidence that he was not guilty of negligence in connection with the default judgment which was entered against him. Quoting the jurisdiction to set aside a judgment of the Ninth Circuit judgment has been obtained by fraud, mistake or excusable. Jones v. Commons, 67 Cir. 481; Freeman Bull. Inc. v. Dukowski, 84 Il. App. 168. In the case last cited the criteria filed was a judge's petition be found in the record. In holding that one, Mr Bill in equity, might obtain relief against a judgment obtained as a result of such a mistake, and that in support of such a Bill one might introduce evidence against its truth of the judgment sought to have been a mistake, the court referred to Jones v. Dunkford, 32 Ill. 321, where the mistake alleged was a judge's return and where it was held that equitably not substantial against the truth of that return, for this reason. If there of equity then Bill never was jurisdiction to intervene and give the requisite relief, nor is permit the party injured to ever obtain the truth of the return and when it so be false, although it is a matter of record."

If the facts were as alleged by the defendant in his petition and the proof submitted by the defendant bearing to show, it may not be said that the defendant was guilty of any

negligence in connection with the judgment entered against him by default. His demand for a jury trial having been filed, he would have had no occasion to observe the court calls or the published account of the court orders, so far as they might affect this case, until the issuance of the next jury calendar.

As to whether the petition set forth a good defense, the plaintiff contends that it does not, and in this connection the plaintiff points out that in his petition the defendant merely states that he has a good defense on the merits to the action of the plaintiff, "as appears from said affidavit of merits hereinbefore set forth" but that there is no statement in the petition nor in the affidavit thereto to the effect that the allegations of the affidavit of merits are true or even that anyone believes them to be true. In our opinion the record does not bear out this contention. The defendant does state in his petition that he has a good defense on the merits as appears from his affidavit of merits and he further alleges in the petition that he "can prove the allegations contained in said affidavit of merits, by competent and material evidence."

By its statement of claim the plaintiff alleges that it was about to enter into a contract with the American House Wrecking Company for the purchase of certain material at a given price when the defendant orally guaranteed the delivery of the material and the performance of the contract by the American House Wrecking Company, and that at this time the plaintiff received a receipt from the American House Wrecking Company acknowledging the receipt of $10,000.00 from the plaintiff on account of the purchase of certain specified material in which receipt it was provided that in the event of non-delivery of the

specified material, an allowance of one per cent per pound was to be made, which receipt contained the words, "Security assured; By F. Gordon." In its statement of claim the plaintiff further alleged that at the same time it gave the defendant a check for $10,000 drawn to the defendant's order, which check was later endorsed by the defendant and paid, the defendant receiving the sum of $10,000.00 thereon. It is then alleged that the American House Wrecking Company had delivered material to the plaintiff under this contract to the extent of $7626.57, only, wherefore there is due from the defendant to the plaintiff the sum of $2373.43.

By his affidavit of merits, copy of which was included in the petition to vacate the judgment, the defendant denied that there was due from him to the plaintiff the sum of $2373.43, or any other sum, and he stated that he was without any knowledge whether he had ever signed any such receipt as was referred to in the statement of claim, or whether, if he did, it contained any such words as "Security assured; By". In his affidavit of merits the defendant further alleged that the promises relied upon by the plaintiff, as set forth in his affidavit of claim, were promises to answer for the debt, default or miscarriage of another and that there was no memorandum of such promise signed by the defendant or anybody authorized by him, as required by the statute; that the contract between the plaintiff and the American House Wrecking Company had been altered and modified in essential particulars, without notice to or consent of the defendant and that the plaintiff and the American House Wrecking Co. made agreements to extend the date of the payment of the obligations of the American House Wrecking Company to the plaintiff, arising out of this contract and that the company had given the plain-

specified interest, an allowance of not less than one year
was to be made, which would prevent the years, "Insert by
mistake; by E. Dawson." In the statement of claim the plain-
tiff further alleged that at the same time it was the defend-
ant's duty to deliver the $10,000 shares to the defendant's order, which
duty was later endorsed by the defendant and paid, the de-
fendant receiving the sum of $10,000 therefor. It is then
alleged that the American Home Trading Company had achieved
material to the plaintiff under such contract to the extent of
$7543.07, and, therefore, that the Tyee Gold Mining to the
plaintiff was on or $2579.41.

By the affidavit of Martin, copy of which was included
in the petition to vacate the judgment, the defendant denied
that there was due from him to the plaintiff the sum of $2579.41,
or any other sum, and he denied that he was without any knowledge
whether he had ever signed any such contract as was referred to in
the statement of claim, or whether, if he did, it contained any
such words as "Insert by mistake; by". In his affidavit of merits
the defendant further alleged that the particulars filed with by
the plaintiff, as set forth in his statement of claim, were pro-
mises to answer for the debt, default or miscarriage of another
and that there was no consideration of such promise signed by the
defendant or anybody authorized by him, as required by the statute;
that the contract between the plaintiff and the American Home
Trading Company had been signed and acquired in essential par-
ticulars, without notice to or knowledge of the defendant and
that the plaintiff and the American Home Trading Co. made
representations to induce the date of the payment of the $10,000 shares
of the American Home Trading Company to the plaintiff, ante-
dating out of this company and that the company had taken the stock

tiff promissory notes from time to time for the full amount of its indebtedness to the plaintiff, which notes had been accepted by the plaintiff, in full discharge of the indebtedness of the American House Wrecking Company; that these notes had frequently been taken up and renewed; payments having been made on them by the American House Wrecking Company and new notes given for the balance, all of which transactions had been without notice to the defendant and without his consent. It was further alleged by the defendant in his affidavit of merits that the American House Wrecking Company was in the course of bankruptcy proceedings, pursuant to an involuntary petition filed against it; that the plaintiff had filed its claim against the bankrupt estate for the full amount of the alleged indebtedness and had become a party to a composition and creditors' agreement extending the time of payment of such indebtedness for the period of 18 months.

The foregoing being the substance of the allegations of the affidavit of merits, subscribed and sworn to by the defendant, all of which were set forth by him in full in the petition he filed to vacate the judgment, and the defendant having alleged in that petition that he had a good defense on the merits of the plaintiff's action as appeared from the allegations he had made in his affidavit of merits, and having further alleged in his petition that he was in a position to prove the allegations in his affidavit of merits, by competent evidence, we hold that the defendant set forth by his petition, with sufficient positiveness and directness, the nature of the defense he claimed to have, which statements must be considered as having been made by the defendant under oath by virtue of the fact that he signed and acknowledged the affidavit of merits itself.

THIS possibly might then lead to some but not the full benefit of its application to the plaintiff, which would be much secured to by the plaintiff, in full discharge of his indebtedness to the American Dredging Company. This claim seems to have already been dealt with by the internal revenue bureau treating that sum as item by the American Dredge Dredging Company and the notes given for the balance, all of which transaction had been carried out prior to the enactment of the revenue act herein. It was further alleged by the petitioner in its affidavit of merits that the American Dredge Dredging Company was in the course of business, insolvent, thereby to be insolvency petition filed against it; that the immediately had filed the claim against the bankrupt estate for the full amount of the notes indebtedness and had taken a partial in a composition and compromise agreement, accepting the sum of payment of such indebtedness and had taken a partial in a composition and compromise agreement, accepting the sum of payment of such indebtedness and had taken for my petition of 50 cents.

The foregoing being the substance of the allegations of the affidavit of merits, summarized and more so by the demurrer, all of which were not traversed by the in full in the petition be filed to revoke the judgment, and the statutory having alleged in that petition that he had a good defense on the merits of the counterclaim which he alleged from the allegations he had made in the affidavit of merits, and having further alleged in the petition that he was in a position to prove the allegations in his affidavit of merits, by competent evidence, we hold that the demurrer was proper to the petition, with sufficient particularness and clearness, the nature of the defense to be claimed to have, which allegation must be considered in having been made by the defendant under oath by virtue of the fact that he alleged the counterclaim the affidavit of merits itself.

We are further of the opinion that the petition filed by the defendant set forth a good defense. As to whether it showed a lack of negligence on his part, we have already observed that such was not the case if the facts as to what happened in court on return day, July 19, were as set forth by the defendant in his petition. On that question the court heard oral testimony submitted by the respective parties, to which reference has heretofore been made. We are of the opinion, as to this point, that we would not be justified in holding that the finding of the trial court, to the effect that the facts were as set forth by the defendant in his petition, is against the manifest weight of the evidence.

For the reasons stated the order of the Municipal Court appealed from is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

Opinion filed June 20, 1923.

285 - 27761

HYMAN FEINBERG and LOUIS C. ROBINSON, doing business as CHICAGO SMELTING & REFINING COMPANY, Appellants.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
HYMAN ROSE, Appellee.	

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiffs filed their statement of claim for $125.00 which they alleged they had paid to the defendant, "to insure prompt delivery of certain metals purchased by plaintiffs from said defendant." They alleged further that the defendant had broken the "contract of purchase by not delivering said metals, although requested so to do and has not returned the said deposit," sued for.

The defendant filed a statement of claim for set-off, in which he alleged that he had made a contract with the plaintiffs, whereby he had agreed to sell them 16,000 pounds of metal at $60.00 per ton and that at the time this contract of purchase and sale was entered into, the plaintiffs had made a payment of $125.00 on account, and it was then agreed that the goods were to be delivered when the balance was paid. The defendant alleged further that he had at all times been ready, willing and able to fulfill his part of the contract, but that the plaintiffs had refused to pay the balance due under the contract and had refused to accept delivery of the metals, although the defendant had frequently offered to make delivery. The defendant further

Opinion filed June 20, 1923.

[illegible] - [illegible]

[illegible] and [illegible] G. [illegible], doing business as [illegible] & [illegible] [illegible],	
Appellees,	[illegible]
v.	[illegible]
[illegible],	[illegible]
Appellee.	

[illegible]

[illegible] [illegible] relative the [illegible] of the court.

The plaintiffs filed their statement of claim for [illegible] $[illegible] upon [illegible] by the defendant, "the [illegible] through delivery of certain [illegible] by plaintiffs from said defendant." They alleged further that the defendant has broken the "contract of warranty by not delivering said [illegible], although requested so to do and has refused the said delivery," [illegible].

The defendant filed a statement of claim for set-off, in which he alleged that he had made a contract with the plaintiffs, whereby he was entitled to sell then 10,000 pounds of [illegible] at $20.00 per ton and that at the time this contract of purchase was said and entered into, the plaintiffs had made a payment of $[illegible].00 on account, and it was [illegible] agreed that the goods were to be delivered when the balance was paid. The defendant alleged further that he had at all times been ready, willing and able to fulfill his part of the contract, but that the plaintiffs had refused to pay the balance due under the contract and had refused to accept delivery of the goods, although the defendant had frequently offered to make delivery. The defendant further

alleged that the price of the metal involved had decreased to $15.00 per ton, and that by reason of the failure of the plaintiffs to comply with the terms of the contract, the defendant had sustained damages in the sum of $235.00, for which amount he asked that judgment be entered in his favor.

The issues on these pleadings were submitted to the court without a jury, and at the conclusion of the hearing, the court found the issues for the defendant on the defendant's claim for set-off.

The court fixed the defendant's damages at the sum of $195.00 and entered judgment against the plaintiffs and in favor of the defendant for that amount. To reverse that judgment, the plaintiffs have perfected this appeal.

The plaintiff, Feinberg, testified that his firm had purchased 4,000 pounds of metal from the defendant at the price of $60.00 per ton, delivery to be in 30 days; that about 30 days after this transaction, the defendant came to the witness and explained that he was operating on a small capital and could not afford to hold the metal, and requested the plaintiffs to accept delivery of the metal and pay him for it; that he then told Rose that the plaintiffs were starting to move their plant and it would be inconvenient to take the metal at that time, but that they would pay Rose for it and the latter could then hold it until after the moving had been completed, an operation which would consume several months; that the witness then gave the defendant a check for $125.00, which was the amount estimated would be due on the purchase, and that the parties agreed that there might be an adjustment either way if that amount were found not to be correct; that the moving operation proved longer than anti-

claims that the price of the metal involved has increased to $18.00 per ton, and that by reason of the failure of the plaintiff to comply with the terms of his contract, the defendant had sustained damages in the sum of $[illegible], for which amount he asked that judgment be entered in his favor.

The basis on which plaintiffs were entitled to the court without a jury, and at the conclusion of the hearing, the court found the issues for the defendant on the petitioner's claim for set-off.

The court found the plaintiff's damage at the sum of $[illegible] and entered judgment against the plaintiff and in favor of the defendant for that amount. To reverse this judgment, the plaintiffs have perfected this appeal.

The plaintiff, relying, contrary to the fact, has purchased 6,000 pounds of metal from the defendant at the price of $18.00 per ton, believing it to be 99 days; that about 30 days after this transaction, the defendant came to the plaintiff and explained that he was expecting a small quantity of metal in this city, and requested the plaintiff to accept delivery of the metal and pay him for it; that he then told the plaintiff that the plaintiff was starting to make plans and it would be inconvenient to take the metal at that time, but that later would pay them for it and the latter could take it in-stead of the metal. The plaintiff was satisfied, on receipt of the metal, that the defendant was entirely responsible, and that the delay was due to the weather, and that the parties agreed that there might be an adjustment of the price if the market was found to be varying; that the plaintiff expected to have the metal-

cipated and that the witness did not call on the defendant to deliver the metal until some time, in September or October, 1920, and that when this was done the defendant claimed the plaintiffs had bought 16,000 pounds and not 4,000 pounds and that the witness then said to the defendant, "Well, why didn't you deliver 16,000 pounds?" and that this was all that was said.

This was apparently all the testimony introduced in behalf of the plaintiffs in connection with the making out of their direct case. The defendant Rose then testified that through Feinberg he sold the plaintiffs 16,000 pounds of metal at $60.00 per ton, delivery of which was to be made in about 30 days; that at the end of that period he went to the plaintiffs' office and told Feinberg that the little money he had was tied up in his business and that he wanted to deliver this metal so that he could get his money out of it. That he then agreed with the plaintiffs to hold the metal longer if they would advance about 15 or 20 per cent of the purchase price; that thereupon, Feinberg gave him a check for $225.00, to apply on account, promising to pay the balance on delivery. The defendant then testified that about a year after this contract of purchase and sale was entered into he sent the plaintiffs a registered letter, which they refused to receive. This letter was produced at the trial and received in evidence. Apparently it had never been opened until it was introduced in evidence. In this letter the defendant referred to the contract, on which a partial payment of $125.00 had been paid and that it had been agreed that the balance was to be paid on delivery of the material. He then went on to advise the plaintiffs that he had been ready and willing to make the delivery and had so notified the plaintiffs previously but that the latter had delayed in accept-

alleged and that the witness did not call on the defendant to deliver the metal until some time, in September or October, 1929, and that when this was done the defendants claimed the plaintiffs had bought 14,000 pounds not 4,000 pounds and that the alleged plan made in the defendant, "Well, why didn't you deliver 14,000 pounds?" and that this was all that was said.

This was apparently all the bookkeeping information in behalf of the plaintiffs in connection with the making out of their claims. The defendants have claimed that through Feldberg he sold the plaintiffs 14,000 pounds of metal at $60.00 per ton, delivery of which was to be made in about 30 days; that at the end of that period he went to the plaintiffs office and told Feldberg that the little money he had was tied up in his business and that he wanted to deliver this metal so that he could get his money out of it. That the time agreed with the plaintiffs to hold the metal longer if they would advance about 15 or 20 per cent of the purchase price; that thereupon, Feldberg gave him a check for $2000.00, to apply on account, promising to pay the balance on delivery. The defendant then delivered the metal to the plaintiffs a few days after the receipt of purchase and sale was mistaken into to send the plaintiffs a registered letter, which they refused to receive. This letter was produced at the trial and marked in evidence. Apparently it had never been opened until it was introduced in evidence. In that letter the defendant referred to the contract, in which a partial payment of $2000.00 has been made and that it had been agreed that the balance was to be held on delivery of the material. He then went on to advise the plaintiffs that he had been ready and willing to make the delivery and had so notified the plaintiffs previously but that the latter had delayed in accepting

ing it. The defendant, in this letter, then proceeded to make another offer of delivery and advised the plaintiffs that unless they accepted the metal he would be obliged to sell it and hold the plaintiffs liable for any loss which might result. The defendant further testified that he telephoned the plaintiffs a number of times, insisting that they take the metal, but they always requested him to wait; that on one occasion he met the plaintiff, Robinson, on the street and had a talk with him and he promised to "take in the material". He then testified to the market value of the metal involved in this case, in December 1920, which was the month in which he sent the plaintiffs the registered letter referred to.

Inrebuttal, the plaintiff Robinson testified that he never spoke to the defendant on the street, as the latter had testified, and that he had refused to receive the registered letter, which the defendant had sent, because he suspected some trick.

The contention of the plaintiffs is, that under the evidence submitted to the trial court the finding should have been in their favor and against the defendant. Apparently it is the position of the plaintiffs that the evidence establishes the fact that the defendant neglected or refused to make delivery of or to tender the goods purchased by them under the contract. In our opinion, the trial court was warranted in finding the contrary. Feinberg himself testified that 30 days after the contract was entered into the defendant called to see him "and wanted us to take it in and pay for it", and that he explained to the defendant that the plaintiff was starting to move its plant and that they would pay him for the metal and that the defendant could then hold it until the moving was completed. In many respects the evi-

day it. The defendant, in this letter, also proposed a new method also of delivery and advised the plaintiff that unless they accepted the method he would be obliged to sell it to suit the plaintiffs limits for the lower which might result. The defendant further described that he enjoyment the plaintiff a number of times, insisting that they take the method, but they always responded that he said; that on one occasion he met the plaintiff, Mackenzie, on the street and a talk with him was he proposed to have on the material. He also translated to the market value of the model involved in this case, in December 1920, which was the month in which he sent the plaintiffs the duplicated letter referred to.

Conversely, the plaintiff endeavors initially into he never spoke to the defendant on the street, on the letter was lawfully, and that he was refused to receive the replicated letter, which the defendant had sent, because he suspected some trick.

The conclusion of the plaintiffs is, that unless the evidence submitted to the jury could the finding should have been in their favor and against the defendant. Apparently it is the position of the plaintiff that the evidence establishes the fact that the defendant deliberately or recklessly to make delivery of or to tender the article mentioned by them under the contract. In our opinion, the jury could not warranted in finding the contract. Standard Dictionary indicates that to tender after the contract was entered into the defendant called to see him "and wanted to be take it in and pay for it", and that he explained to the defendant that the plaintiff was absent, is more the plant and that they would be for the model and look the defendant and it would the verdict was warranted. In our judgment the evi-

dence was in direct conflict, and the only witnesses were the parties themselves. The plaintiffs admitted that a registered letter from the defendant was tendered them but they refused to receive it because they "suspected a trick." In this letter the defendant refers to his offers to make delivery and again makes a formal offer to the same effect. The defendant also testifies to a number of telephone conversations with Weinberg, in which he urged the plaintiffs to take the material and pay for it, and these conversations are not denied.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

Opinion filed June 20, 1923.

291 - 27767.

ADOLPH G. HUSEMAN, Appellee, v. GRACE B. STOVER and GAY W. STEVENS, Appellants.	APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The complainant, Huseman, filed his bill against the defendants, Grace B. Stover and Gay W. Stevens, and others, praying for a construction of a clause in the will of one, Harriett B. Reed, deceased. The clause in question read as follows: "Fourth: I give and bequeath to my friend, Adolph G. Huseman, all money on deposit in my name in the Fort Dearborn National Bank at the time of my death." The issues joined on the bill and the answers, were referred to a Master in Chancery for hearing and after such hearing the Master found and duly reported to the Chancellor, among other things, that the testatrix had no money on deposit in the Fort Dearborn National Bank at the time of the execution of her will or at any time thereafter, but that she had on deposit in the Fort Dearborn Trust & Savings Bank the sum of $4,000.00, shortly before the execution of her will, and at the time of her death, $4,060.00, and that her deposit in that bank had been in the neighborhood of $4,000.00, continuously during the period between the time of the execution of her will and the time of her death. The Master further found that at the time of the death of the testratrix,

Opinion filed June 20, 1923.

No. 27027.

GEORGE E. BRAMMER,

Appellee,

v.

GEORGE E. [illegible] and
[illegible] E. [illegible],

Appellees.

Mr. JUSTICE [illegible] delivered the opinion of the court.

The complainant, Brammer, filed his bill against the defendants, [illegible], [illegible], [illegible], praying for a construction of a clause in the will of one, Harriet E. Dowd, deceased. The clause in question read as follows: "[illegible] I give and bequeath to my friend, George E. Brammer, all money on deposit in my name in the First National Bank of the City of [illegible]." The testator died on the 5th day of [illegible], 1920, leaving her husband and [illegible] as her heirs. The testator had no money on deposit in the First National Bank at the time of the execution of her will or at any time thereafter, but she did on deposit in the Port Dauphin Trust a savings fund in the sum of $[illegible], thereby [illegible] the execution of her will, and at the time of her death, $[illegible], and that her deposit in that bank had been in the neighborhood of $4,000.00, continuously during the period between the time of the execution of her will and the time of her death. The Dauphin Trust fund had at the time of the death of the testatrix,

there was found in her security deposit box an envelope addressed to the complainant, containing a communication which bore no date and which read as follows, "Mr. Adolph G. Huseman. My dear boy, I leave for you all the money I have deposited and to my credit in the Fort Dearborn Bank, as a gift from your best friend to my best friend. I hope it may help to take care of you when you are old and unable to work, you have been always so good to me since I have known you and especially since my husband's death. You have indeed been a brother and deserve all I can give you. This is a small reward but the best I can do, accept it from your friend. Harriett M. Reed."

The master further found that the Fort Dearborn National Bank and the Fort Dearborn Trust & Savings Bank were both located in the same building in Chicago; that they had the same street entrance, the latter bank being located on the first floor and the former on the second floor, accessible from the first floor by stairways within the bank, and that the business address and telephone of both banks were and had been the same for many years. The master recommended that a decree be entered, construing the clause in question, by striking the word "National" from the description of the bank, as contained in that clause, and finding that it was the clear intention of the testatrix to give and bequeath to the complainant the money she had at the time of her death in the Fort Dearborn Bank of Chicago, to-wit: the Fort Dearborn Trust & Savings Bank. The report of the master was confirmed in all respects by the Chancellor and a decree was duly entered as therein recommended. The defendants have perfected an appeal to reverse that decree.

It has been repeatedly held by the decisions of our Supreme Court that a will may not be reformed by striking out

Ghosts was (Jinks he had actually figured) has an amazing attraction to the unconscious, combining a reminiscence which have no more any match read as fiction, Mr. Adolph S. Ochs. By and by, I leave for you all the money I have collected and to be divided by the Post Secretary Club, as a gift from you been (Jinks to my best friend. I have to say this to take care of yourself you are sick and unable to work, you have been always so good to me since I have known you but especially since my husband's death. You have indeed been a friend and deserve all I can give you. This is a small remark for the most I can, always is from your friend. Sincerely s. Jinks.

The matter furnished from the Post Secretary Club fund and the fact Secretary found a letter that were with thanks to the Mrs. Matilda H. Jinks, and by the more advent entrance, the latter been leaved on the first floor and the former on the second floor, somewhile from the first floor by stairways within the back, but that the business affairs and takings of both houses were not but have the same for many years. The author remembered that I dared by mistake, mentioning the phrase to creditor, by stating the word "Matilda" from the description of the book, as contained in that phrase, and finding that is was not clear intention of the creditor to give and bequeath to the complainant the sums she had at the time of her death in the Post Secretary Club of Jinks, in-wit: the first business fund & savings fund. The record of the matter was confirmed in all respects by the Chancellor and a decree was duly entered to Jinks recommend. The defendants have persisted as appeal to prevent that matter.

It has been repeatedly held by the decisions of our Supreme Court that a will may not be reformed by striking out

certain words of misdescription, and inserting other words in lieu thereof, where such a course would not be authorized by the language which has been used by the deceased in the will, and in this connection the court has held that extrinsic evidence is never admissible for the purpose of varying the intention of the testator, as expressed by the will itself and that no words may be either taken from or added to a will, which will have the effect of changing the plain meaning of the testator as expressed in the will. Stevenson v. Stevenson, 285 Ill. 486, and cases there cited. In that case, the will purported to devise a piece of property, by legal description, and the property thus described was not owned by the testator. The court pointed out that if the words of false description were stricken out as surplusage, what remained would be meaningless and that such land as might be referred to by the part remaining, could not be located. The court distinguished that situation from another line of cases of which Decker v. Decker, 121 Ill. 341, is one; holding that while it is undoubtedly the general rule "that the intention of the testator is to be gathered from an inspection and consideration of the will, and from no other source, in cases of latent ambiguity, courts do and must listen to extrinsic evidence,- not for the purpose of contradicting or adding to the terms of the will, nor to wrest the words of the testator from their natural operation, but for the purpose of determining the existence or non-existence of latent ambiguity, (for latent ambiguity can only be shown by extrinsic evidence) and for the further purpose of enabling the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time the will was made, whereby to determine the intention of the testator." The court, in that case, further said, quoting from Wigram on Wills (2nd.Am. Ed.)

certain words of testamentality, and inserting other words in lieu thereof, where such a course would be authorized by the language which has been used by the testator in his will, and in this connection the court has held that estimate evidence is never admissible for the purpose of varying the intention of the testator, as expressed by the will itself and that no words may be either taken from or added to a will, which will have the effect of changing the whole meaning of the testator as expressed in the will. Jackson v. Stevenson, 98 Ill. 499, and cases there cited. In that case, the will provided in trust a fund of property, by legal investment, and the property then acquired was not owned by the testator. The court points out that if the words of later description were stricken out as surplusage, that property would be mere legacies and that such land as might be referred to by the part remaining, would not be invalid. The court distinguished that situation from another line of cases of which Becker v. Becker, 121 Ill. 281, is one; holding that while it is undoubtedly the general rule "that the intention of the testator is to be gathered from an inspection and consideration of the will, and from no other source, in cases of latent ambiguity, courts do and must listen to extrinsic evidence,- not for the purpose of ascertaining or adding to the force of the will, nor to vary the words of the testator from their natural operation, but for the purpose of determining the existence or non-existence of latent ambiguity. (for latent ambiguity can only be cured by extrinsic evidence) and for the further purpose of enabling the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time the will was made, thereby to determine the intention of the testator." The court, in that case, further said, quoting from Jarman on Wills (Bud.Am. Ed.)

161, "The law is not so unreasonable as to deny to the reader of an instrument the same light which the writer enjoyed."

Where a latent ambiguity consists of a misdescription and that misdescription can be stricken out and enough remain in the will to identify the person or thing designated, the court will so deal with it. The case last referred to, also involved a piece of land, referred to by legal description. Following the rule referred to, the court said: "If, then, we may strike out of the description of the premises appearing to be devised, so much as is false, and enough remain in the will, interpreted in the light of surrounding circumstances at the time the will was made, to identify the premises devised, this case will fall within" the rule as exemplified by analagous cases to which the court referred. In that decision the court distinguished the situation there presented from the other line of decisions above referred to, as exemplified by the decision in Kurtz v. Hibner, 55 Ill. 514, the court pointing out that in that case "There was no pretence, * * * that by rejecting so much of the description as was false, enough of the description remained so (as) that the lands devised could be identified." In the case at bar the proof showed that the Fort Dearborn National Bank and the Fort Dearborn Trust & Savings Bank were located in the same building; that at the time the testatrix made her will and at no time thereafter did she ever have any money on deposit in the National Bank; but that at the time she executed her will, she did have money on deposit in the Trust & Savings Bank and there remained approximately the same amount to her credit in that bank continuously thereafter up to the time of her death. The evidence showed that the testatrix frequently made reference to the money she had on de-

posit in the Fort Dearborn Bank." The writing found in the security box at the time of her death, addressed to the complainant and signed by the testatrix, tells him that she is leaving for him all the money she has deposited to her credit in the"Fort Dearborn Bank."

While there is no patent ambiguity in the language used by the testatrix in the fourth clause of her will, we are of the opinion that the extrinsic evidence plainly discloses a latent ambiguity. We are therefore of the opinion that on this evidence the court was warranted in eliminating the word "National" as surplusage, and after the elimination of that word, sufficient remains in the clause of the will, to identify the money on deposit to the credit of the testatrix in the Fort Dearborn Trust & Savings Bank, as the money clearly intended by the testatrix to be bequeathed, under this clause, to the complainant.

In order to identify the fund intended to be bequeathed by the testatrix, it is not essential that we replace the word "National" with the words "Trust & Savings." We may clearly identify the fund by reading the clause in question with the word "National" out of it, making it to the effect that the testatrix bequeathes to the complainant, "money on deposit in my name in the Fort Dearborn Bank of Chicago", at the time of her death. If that language had been used by the testatrix in this clause, therewould of course have been no difficulty whatever in identifying the money bequeathed under it.

For the reasons stated the decree of the Superior Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

peak in the Port Dauphin book." The writing found in the secretary box at the time of her death, contained in the commas and signed by the secretary, with the time she is leaving for his all the money she possesses in her purse is the Port Dauphin Hotel.

While there is no direct ambiguity in the language used by the testatrix in the fourth clause of her will, we are of the opinion that the original expression clearly displays a latent ambiguity. We are therefore of the opinion that on this evidence the court was warranted in eliminating the word "Hotel" as surplusage, and after the elimination of that word, sufficient remains in the clause of the will, to identify the money on account to the credit of the testatrix in the Port Dauphin Trust & Savings Bank, as the money strictly intended by the testatrix to be bequeathed, under this clause, at the commencement.

In order to identify the fund intended to be bequeathed by the testatrix, it is not essential that we retain the word "Hotel" or the words "Trust & Savings." We may clearly identify the fund by reading the clause as qualified by the word "Hotel" and at it, making it to the effect that the testatrix bequeathed to the complainant, "money on deposit in my name in the Port Dauphin Bank of Nassau", at the time of her death. If such language had been used by the testatrix in this clause, there could be no doubt as to the testatrix's intention in identifying the money bequeathed under it.

For the reasons stated the decree of the chancellor herein is affirmed.

AFFIRMED.

ISAACS and D'ARCY, JJ. concur.

Opinion filed June 20, 1923.

295 - 27771

PETER SOBIESKI, Appellee, v. CITY OF CHICAGO, et al. On appeal of CITY OF CHICAGO, Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The owners of certain property, located on Western avenue in the City of Chicago, were constructing a building with the front wall at the lot line. After the buildingwas partially erected, the contractor put up what is referred to as a "barricade" across the front of the building. This barricade was constructed of wood, the body of it being made up of ordinary boards running up and down. The bottom of this barricade rested, according to some witnesses, on the sidewalk, and, accordingto other witnesses, within the narrow space between the sidewalk and the building line, and the top of it rested against the front of the building. The boards making up the barricade were nailed to three, 2 x 4 stringers, one near the bottom of the barricade, one near the top and one near the middle. At the top it was tied to the building by means of several boards resting on and nailed to thetop stringer, which boards, at the other end were nailed to the joists of the second floor. It appears that the barricade was further held in place by several boards nailed to the middle stringer, which boards, at the other end were nailed to the flooring of the first floor of the building. While the plaintiff and his family were

passing by the building after dark the barricade fell out over the sidewalk, knocking the plaintiff down and inflicting serious injuries, which form the basis of this action for damages, which was brought by the plaintiff against the owners, the contractors, and the City of Chicago. The plaintiff dismissed his suit as to one of the owners and there was a verdict of not guilty as to the others, and a verdict of guilty as to the contractor and the City of Chicago, and judgment was entered against these two defendants, for the amount of the verdict, $22,500. To reverse that judgment the City of Chicago had perfected this appeal.

The plaintiff alleged in his declaration, that in connection with the construction of this building, by the contractor, the sidewalk and street in front of the building were being used, by permission of the City of Chicago, and that the defendants wholly failed in their duty toward the plaintiff, "in that they negligently and carelessly allowed the said heavy board wall or fence infront of the said property to become defective and insecure, and ina dangerous condition", and that by reason thereof this wall or barricade fell on the plaintiff and injured him.

In one of the counts the plaintiff set forth an ordinance of the City of Chicago, providing that "No person or corporation shall erect or place any building or other structure, in whole or in part, upon any street, alley, sidewalk or other public ground within the City", and providing for a fine in case any person or corporation violated or failed to comply with the provisions of that ordinance. In this count the plaintiff further alleged that it was the duty of the defendants to exercise due care and caution for the safety of the plaintiff and others who were lawfully upon the street and "that defendants wholly failed and negligently and carelessly permitted the board

passing by the building after dark the hatchwade fell out over the sidewalk, knocking the plaintiff down and inflicting severe injuries, which form the basis of this action for damages, which was brought by the plaintiff against the owners, the contractors, and the City of Chicago. The plaintiff claimed that as to one of the owners and there was a verdict of not guilty as to the others, and a verdict of guilty as to the contractor and the City of Chicago, and judgment was entered against these two defendants, for the amount of the verdict, $10,000. To reverse that judgment the City of Chicago has perfected this appeal.

The plaintiff alleged in his declaration, that in connection with the construction of this building, by the contractor, the sidewalk and street in front of the building were being used, by permission of the City of Chicago, and that the defendants wrongfully failed to exert duty toward the plaintiff, "in that they negligently and carelessly dismiss the main heavy hatch wall or frame instead of the main property to secure defective and insecure, and the dangerous condition", and that by reason thereof this wall or hatchwade fell on the plaintiff and injured him.

In one of the counts the plaintiff has fixed on ordinance of the City of Chicago, providing that "No person or corporation shall erect or place any building or other structure, in whole or in part, upon any street, alley, sidewalk or other public ground within the City", and providing for a fine in case any person or corporation violated or failed to comply with the provisions of that ordinance. In this count the plaintiff further alleged that it was the duty of the defendants to exercise due care and caution for the safety of the plaintiff and others who were lawfully upon the streets and their sidewalks, wrongfully failed and negligently and carelessly permitted the hatch

wall or fence in front of the property aforesaid, to be erected contrary to the provisions of said ordinance and to be in a defective condition," and that by reason thereof, it fell upon the plaintiff and caused the injuries complained of.

In support of this appeal the City of Chicago contends that even though it be assumed that this barricade was in an unsafe and dangerous condition, it could only be removed by the City through its employees or servants going upon private property and causing its removal, in the exercise of the police powers of the City, and that no action for damages lies against the City for any injury which may result from a failure to exercise such power or from a failure to perform any acts which the City is empowered to exercise as a governing agency in the discharge of duties imposed upon it for the public or general welfare. In this connection it is further urged that the were reliable testimony, as to just where the bottom of this barricade rested, is to the effect that it was not upon the public sidewalk but rather in the one foot space between the sidewalk and the building line. In our opinion, this point is not of very great importance. It would seem from an examination of the testimony, that there is sufficient to warrant a finding that the barricade rested on the sidewalk, but, in any event, it was outside of the lot line, and one of the witnesses relied upon by the defendant in this connection testified that the bottom stringer rested up against the sidewalk.

On the authority of Hanrahan v. City of Chicago, 289 Ill. 408, we are of the opinion that the city is liable to respond in damages in case of injuries received by an individual under such circumstances as those involved in the case at bar. In the Hanrahan case, the plaintiff recovered a judgment against

wall or fence in front of the property affected, or be accepted contrary to the provisions of this ordinance or in be in a dangerous condition," and that by reason thereof, it fell upon the plaintiff's car causing her injuries as aforesaid.

In support of this appeal the City of Chicago contends that even though it be assumed that such barricades are in an unsafe and dangerous condition, it could only be removed by the City through its employees or officers using some physical property and causing its removal. In the exercise of the police powers of the City, one has no action for damages lies against the City for any injury resulting from a failure to perform such power or from a failure to perform and duty which the City is unknown to exercise as a governing agency in the discharge of duties imposed upon it for the health or general welfare.

In this connection it is "argued" that the more reliable testimony, as to just where the bottom of this barricade rested, is to the effect that it was not upon the public sidewalk but rather in the one foot space between the sidewalk and the building line. In our opinion, this point is not of very great importance. It would seem from an examination of the testimony that there is sufficient to warrant a finding that the barricade rested on the sidewalk, but, in any event, it was outside of the lot line, and one of the eliminator notice upon by the instructions in this connection is(?)of that the jury should regard against the defendant.

In the authority of Commonwealth v. Duff et Trustee, 332 Ill. 450, we are of the opinion that only in (?)to recovery in damages in case of injuries received by an intrinsical nature such circumstances as these involved in the case at bar.

In the Bartman case, the plaintiff received a judgment against

the City of Chicago, for injuries suffered when he was struck by a canopy or awning which was attached to the front of a building and extended out over the sidewalk; this canopy or awning, having become unsafe through decay, and its fall having been occasioned by a heavy snow fall. In that case, as in the case at bar, it was the contention of the City of Chicago that its failure to remove the thing which was proven to be dangerous, involved the failure of the City to perform acts which it was empowered to do as a governing agency and in the discharge of duties imposed for the public or general welfare. In that case the Supreme Court held that this contention could not be sustained, and in that connection the court said, "The city is not liable for its officers' negligence while they are exercising judicial, discretionary or legislative authority conferred by its charter or while discharging their duties imposed solely for the benefit of the public. Where a municipal corporation is acting, within its authority, in a ministerial capacity in the management of its property or in the discharge of its duties in repairing or removing obstructions from streets, or is negligent in failing to discharge its duties of keeping its streets in repair, and in safe condition for travel, it is liable for all injuries caused by such negligence when the party injured is exercising due care for his safety. Johnston v. City of Chicago, 258 Ill. 494." The court then went on to hold that "In removing obstructions or dangers from its streets it (the City) acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner. City of Chicago v. Seben, 165 Ill. 371. The omission of such municipality to discharge the duty of repairing its streets and freeing the same from dangers, renders it liable to one injured by reason of such omission and failure, when such person is exercising due care.

The positive duties of incorporated cities in this State require them to keep their streets reasonably safe for pedestrians traveling the same and who use reasonable care in so doing. People v. Willison, 237 Ill. 584; Village of Palestine v. Siler, 225 Ill. 630. * * * The weight of authority in this country is, that where the duty of keeping the streets in reasonably safe condition for travel by pedestrians using due care is vested in incorporated villages and cities, such duty requires such municipalities to remove all obstructions and dangers below, on and above the surface of the streets that are dangerous to travelers thereon, and that such obstructions include awnings and other overhead fixtures. For failure to exercise due care in discovering and removing the same, such municipalities are liable for personal injuries occasioned thereby."

In support of its decision the Supreme Court refers to a number of cases, and among others, Cason v. City of Ottumwa, 102 Ia. 99, in which the plaintiff brought suit for damages, making the Ottumwa Opera House Company and the City of Ottumwa parties defendant. For the purpose of advertisingthe entertainments at the opera house, certain bill boards were used, these being placed so that the top rested against the building while the bottom rested a few inchs from the building on the sidewalk. While a bill board, maintained by the theater with the knowledge and consent of the city, was in the position described, it was blown over by the wind, striking the plaintiff who was passing on the sidewalk, with such force as to inflict the injuries complained of. From a judgment recovered by the plaintiff the City perfected an appeal. In affirming the judgment the court observed that it was the duty of the city to keep its sidewalks in a reasonably safe condition and that this duty

The positive duties of incorporated cities in this state require them to keep their streets reasonably safe for vehicles traveling the same and are responsible once in so doing. Fowler v. Fairfax, 187 Ill. 544; Filings of Pontiac v. Baker, 122 Ill. 290. "The exist of authority in this country is, that where the duty of keeping the streets in reasonably safe condition for travel by pedestrians using the same in vehicles in inserted vehicles and riding, such duty requires such municipality to remove all obstructions and dangers below, or and above the surface of the streets that are dangerous to travelers thereon, and that such municipalities are liable for personal injuries resulting from failure to do so."

In support of his decision the Supreme Court refers to a number of cases, and among others, Jones v. City of Chicago, 168 Ill. 89, in which the plaintiff brought suit for damages against the City for injuries received in the fall of Chicago during the Chicago fire. The City had placed the plaintiff in the place of danger. For the purpose of advertising entertainment at the opera house, certain bill boards were erected, these being placed so that the top reached against the building while the bottom rested a few inches from the building on the sidewalk. While a bill board, maintained by the theater with the knowledge and consent of the city, was in the position described, it was blown over by the wind, striking the plaintiff who was passing on the sidewalk, with such force as to cause the injuries complained of. The judgment rendered by the Circuit Court the City petitioned to appeal. In affirming the judgment the court observed that it was the duty of the city to keep its sidewalks in a reasonably safe condition and that this duty

extended not merely to the surface of the walk, but, quoting from Bliven v. City of Sioux City, 85 Ia. 351, "to those things within its control which endanger those using the walk properly." The case there referred to also involved injuries caused by the fall of a bill-board, standing on the sidewalk and resting up against a building wall. Our Supreme Court in the Mangrahan case supra, also refers to the case of Wheeler v. City of Ft. Dodge, 131 Ia. 566, where the defendant city had authorized a commercial club to stretch a wire across the street which was to be used by a woman performer in some acrobatic feats in connection with a celebration or carnival, and while engaged in the performance she lost her hold and fell, striking the plaintiff and inflicting the injuries which were the basis of the action brought against the city. In the trial court there was a directed verdict in favor of the defendant city. On appeal the judgment, based on that directed verdict, was reversed. In connection with its decision the court said: "The public right (to the use of the street) goes to the full width of the street and extends indefinitely upward and downward so far at least as to prohibit encroachment upon said limits by any person by any means by which the enjoyment of said public right is or may be in any manner hindered or obstructed or made inconvenient or dangerous." The court referred to many decisions and held that a city is liable for permitting conditions which endanger travelers, but do not constitute any defect in the street surface or obstruct travel thereon, referring to Duffy v. Dubuque, 63 Ia. 171, where the city was held chargeable with neglect in permitting a section from the roof of an old buildingto stand on edge near a sidewalk, but not in the street, where it was likely to fall on travelers using the public way. In the Wheeler case, the court also referred to the Iowa statute, the effect of which is not different from the law in this State as laid

expressed not merely in the matters at issue with, but, nothing from Bilyeu v. City of Kansas City, 59 Ia. 448, "no duty within its confines which endanger those using the well property." The case then referred to also involved injuries caused by the fall of a bill-board, standing on the sidewalk and resting up against a building wall. One supreme court in the Bourdon case, also refers to the case of Dwelley v. City of St. Paul, 33 Ia. 486, where the plaintiff was endeavoring a woman-kind step or straddle this street to which point was in occasion by a woman performer in some acrobatic feats in connection with a celebration or concert, and while employed in the performance she lost her hold and fell, fracturing her distinct and injuring the internal which may by reason of the action through equipment was by. In the trial court there was a directed verdict in favor of the defendant city. On appeal the judgment, based on that directed verdict, was reversed. In connection with its decision the court said: "The public right (to the use of the street) goes to the full width of the street and extends indefinitely upward and downward so far at least as to prohibit encroachment upon said light by any person by any means by which the enjoyment of said public right is or may be in any manner hindered or obstructed or made incommodious or dangerous." The court referred to some decisions and said that a city is liable for permitting conditions which endanger travelers, but is not responsible for defect in the street surface or obstruct street structure, referring to Wolfe v. Mayor, 52 Ia. 172, where the city was held chargeable with negligent in permitting a section from the roof of an old building among on edge near a sidewalk, not not in the street, which it was likely to fall on travelers using the public way. In the Bourdon case, the court also referred to the Iowa cases, the effect of which is not different from the cases cited in this opinion.

down by the Supreme Court in the Hanrahan case. The court referred to the alleged distinction between acts done by a municipality in its governmental capacity, for which it is contended no liability exists, and those done in its private or corporate capacity and then said, "Tested even by the supposed distinction drawn between municipal acts which are purely governmental in their nature and those which are merely ministerial or administrative, or pertain more especially to private and corporate rights and duties, the care and maintenance of the safety of the streets falls within the latter class."

We are unable to appreciate any distinction in substance between the physical situation presented by the facts involved in the Hanrahan case and those involved in the case at bar, which are more similar to the facts involved in several of the cases to which the court refers in the opinion filed in the Hanrahan case.

The defendant, City of Chicago, further contends that the trial court erred in denying its motion for a directed verdict, the contention in this connection being that the plaintiff offered no testimony tending to show the City had actual notice that this barricade was in a defective or dangerous condition and that the testimony was further, not such as to establish constructive notice to the City. On the question of notice, one witness testified that when passing the building in question, about five o'clock on the afternoon of the day on which the barricade fell over, he noticed that it was loose at the top and was shaking. Another witness testified that he had occasion to take a street car at the point where this building was being erected, every morning on the way to his employment; that he had noticed this barricade for a period of 7 to 10 days before

done by the Supreme Court in the Washington case. The court recognized in the alleged distinction between quasi-corporations by a mere formality in the governmental capacity, for which it is unknown as to liability exists, and there does in the private or corporate capacity and then said, "Further even by the supposed distinction drawn between municipal acts which are purely governmental in their nature and those which are purely ministerial or administrative, or perhaps more generally as private and corporate rights and duties, the mere non-performance of the duty of the actors falls within the latter class."

We are unable to appreciate any distinction in meaning between the phrases "wrongful act" and "tort" as the terms are used in our Constitution and statutes and in the decisions of the courts, which are also the law in our State interpreting it because of the cases in which the court refuses to the opinion that is the Dartmouth case.

The defendants, City of Idaho, further contends that the trial court erred in sustaining the motion for a directed verdict, the contention is that sufficient evidence was offered on behalf of the plaintiff to show the jury had actual notice that this particular was in a defective or dangerous condition and that the testimony was further, not such as to establish constructive notice to the city. On the question of notice, one witness testified that when passing the building in question, about two o'clock on the afternoon of the day on which the particular fell over, he noticed that it was lower at the top and was sagging. Another witness testified that he had occasion to take a return car at the point where the building was being erected, every morning on the way to his employment; that he had noticed this particular for a period of 2 to 3 days before

the time it was blown over, and he further testified that during all of the time he noticed that the barricade "was awful loose, it was shaking." On cross-examination he first testified that there was no wind and he did not know what made it shake and later he said, "We had a little wind." A summary of the weather report issued in Chicago for the month of November, 1919, appears in the record. For the period of 10 days prior to the occurrence involved in this case this report shows a maximum wind velocity of from 14 to 33 miles an hour. On two of these days the wind was from the south. On all of the other days it was from the west, southwest or northwest, except on the last day, when it was from the north with a maximum velocity of 27 miles an hour and an average of 18 miles an hour. In our opinion the testimony of this witness was sufficient to make out at least a prima facie case of constructive notice of the condition of this barricade, to the City of Chicago. The issue involving the question of notice was properly submitted for the consideration of the jury. Although the defendant contractor, called as a witness the man who built this barricade and although the contractor himself testified to the manner in which the barricade was constructed, and although they testified that it was constructed in a proper and workmanlike manner, neither was asked any question as to whether it was or was not firm up to the date of the occurrence in question. There is some force in the contention of the plaintiff, to the effect that the manner of tying the barricade in to the building, as testified to by the contractor and his employee, was such that the jury might be warranted inconcluding that it was not very effective in the first place. It appears from this testimony that one by four braces were used for this purpose; three or four at the top stringer, extending from that stringer to the joists of the second floor, and three or four from the

the time it was blown over, and he further testified that during all of the time he noticed that the structure "was rocking, it was moving." On cross-examination he first testified that there was no wind and he did not know how long it rocked and later he said, "It had a little wind." A summary of the weather report issued in Chicago for the month of November, 1930, appears in the record. For the period of 10 days prior to the accident involved in this case this report shows a maximum wind velocity of from 16 to 28 miles an hour. On two of these days the wind was from the north. On all of the other days it was from the west, northwest or northeast. Again on the last day, when it was from the north with a maximum velocity of 27 miles an hour and an average of 18 miles an hour. In our opinion the testimony of lay witnesses was sufficient to make out at least a prima facie case of constructive notice of the condition of this structure, to the City of Chicago. The issue involving the question of notice was properly submitted for the consideration of the jury. Although the defendant contractor, acting as a subcontractor for the Chicago Park District, erected the structure, and although the defendant contractor testified that the wind was blowing at the time it was completed, and although they testified that it was constructed in a proper and workmanlike manner, neither was asked any question as to whether it was or was not fair to say that the occurrence in question, there in such form it the construction of the plaintiff, to the effect that the manner of tying the bandstand in the building, as testified to by the contractor and his employee, was such that the jury might be warranted in concluding that it was not very effective in the first place. It appears from this testimony that the bandstand was tied in this building by three or four or the way straight, extending from two stanchions on the inside of the second floor, and three or four from the

middle stringer extending down to the flooring of the first floor. The testimony is that in fastening these boards to the respective stringers eight penny nails were used and that these nails were 2½ inches in length. It is apparent that these one by four inch braces, used to tie the barricade in to the building, would not rest flush with any surface of the two by four stringers, but would be in contact with the stringers, either at one corner of the stringer or at the very end of the one by four board used as a brace. Two nails of the length of 2½" to each one of these 1" x 4" boards, at the stringers, were used.

An examination of the record shows that, contrary to the contention of the City, in its brief, the plaintiff did offer evidence of actual notice to the City, for the witness who testified that he had noticed that the top of the barricade was loose, for some days prior to the occurrence in question, further proceeded to say, in answer to questions put by counsel for the plaintiff, that four or five days prior to the accident he had called this matter to the attention of a police officer. An objection of counsel for the defendant, City of Chicago, to this testimony was sustained, the court observing that it called for a conversation. That, however, did not make the testimony incompetent. Under the law it would not be necessary to establish actual notice to the City by proving a notice in writing, but it would be entirely competent if some proper agent of the City had been notified orally of the condition in question, which would, ofcourse, involve a conversation. On cross examination by counsel for the defendant contractor, this witness was asked how the plaintiff had discovered that the witness had seen the barricade shake and that he had talked with a policeman about it, and he answered, without objection, "I was waiting for a car, I

said, 'By God, it is pretty dangerous the way that is shaking there', that is all I said to him, and the car came along." Later, on his cross-examination he explained that sometime later while on the same corner, a man had approached him and asked him if he knew anything about this accident, and he was then asked whether he had ever told anybody about this barricade shaking, except the policeman and he answered, "I told the policeman about it, but I did not tell that man because I did not know who that man was." This being the state of the record we cannot sustain the contention of the City that there was no satisfactory proof of notice of the condition of this barricade, within such a time prior to the occurrence inquestion, as to make it negligence on their part not to have removed it or required it to be strengthened.

The defendant City of Chicago further complains of an instruction submitted by the plaintiff and given by the court. By this instruction the court practically recited the substance of the plaintiff's declaration, prefacing that recital with the statement that "it was charged in the plaintiff's declaration" and the court further, at the end of such recital, stating that if the jury found from the preponderance of the evidence, "that all the allegations of the plaintiff's declaration above set forth are true," then they should find the defendant guilty. Counsel for the City urge a number of things against this instruction which, in our opinion, are not tenable. In our opinion, however, instructions giving a lengthy recital of the allegations made by the plaintiff in his declaration and concluding with a statement to the effect that the jury should find the defendant guilty, if they find all the allegations of the plaintiff's declaration, as thus recited, are true, by a preponderance of the evidence, while in a strict sense stating the law, may often prove misleading. But we do not deem the giving of the instruction here complained of ,

[illegible] 'By God, it is pretty dangerous for any jury to disagree there'. That is all I said to him, not for my own sake, [illegible] Latter, on his cross-examination by Mr. [illegible] [illegible] while on the same occasion, a [illegible] [illegible] [illegible] he knew anything about this accident, and he was [illegible] whether he had ever told anybody about this accident [illegible], except his partners and his accountant. ". Now the partners [illegible] it, but I did not tell them [illegible] I did not know [illegible] man." This being the state of the record we cannot [illegible] the assertion of the City that Mr. [illegible] [illegible] of notice of the negligence of this surveyor, which was a [illegible] prior to the occurrence [illegible], or in fact it negligence [illegible] Such proof has to have weight if it is required it is for [illegible].

The defendant City of Brooklyn further complains of an instruction submitted by the plaintiff and given by the court. By this instruction the court generally received the testimony of the plaintiff's contention, providing that capital will the statement that "it was charged in the plaintiff's complaint" and the court further, at the end of such [illegible], stating that if the jury found from the preponderance of the evidence, "that all the allegations of the plaintiff's declaration above set forth are true," then they should find for [illegible] [illegible]. Defendant for the City urge a number of things against this instruction which, in our opinion, are not tenable. In our opinion, however, instructions giving a simply recital of the allegations made by the plaintiff in his declaration and containing only a statement to the effect that the jury should find the defendant guilty, if they find all the allegations of the plaintiff's declaration, as true [illegible], are bad, by a preponderance of the evidence, while it is [illegible] [illegible] the law, may often [illegible]. But we do not deem the giving of the instruction here complained of,

to have been such error as would justify this court in setting aside the verdict of the jury and judgment of the trial court.

Finally it is contended by the City that the damages awarded were excessive. The plaintiff was a locomotive fireman, thirty five years of age, and for a year prior to his injury had been receiving from two hundred to two hundred and fifty dollars a month, and he had about reached the point where he was ready to advance from fireman to a locomotive engineer. The hearing of this case in the trial court occurred some two years after the injuries were received, during all of which time the plaintiff had been unable to engage in any work. The plaintiff suffered a fracture of the right femur, and there were further injuries of the muscles of his right shoulder; and to his chest, back and kidneys. In view of the extent of the serious injuries he received, his prospective earnings and the value of money as we find it today, we are of the opinion that this court would not be warranted in holding that the damages awarded the plaintiff were excessive.

For the reasons stated the judgment of the Circuit Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

to have been such error as would justify this court in reversing which the ruling of the lower court sustaining the demurrer.

Finally it is contended by the appellant that the complaint states a cause of action. The plaintiff's complaint alleges, during five years of his, and the plaintiff's minority, he had been prevented from the enjoyment of the benefits and rights of a child, and he had been deprived of his right to be ready to receive from his father or a legitimate relationship.

The decision of this case is the first time this question was put before the authorities this decision, which is of course the relativity and been made to depend in my view. The plaintiff suffered a violation of the civil rights, and that was the violation of the duties of the civil obligations and to his child, but not damage. In view of the which of the decision judgment be reversed, the demurrer sustained and the value of money on an item is today, in view of the opinion that this court would not be convinced in holding that the complaint should be sustained.

For the reasons stated the judgment of the trial court is affirmed.

Lewis and Fitzgerald, JJ., concur.

Opinion filed June 20, 1923.

299 - 27775

STELLA W. MANDL, Admx. of the Estate of CORNELIA WOLFF, Deceased, Appellee,	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
v.	
CITY OF CHICAGO, Appellant.	

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The deceased, Mrs. Wolff, originally brought this action against the City of Chicago, to recover damages caused by injuries she suffered in connection with a fall, which she alleged in her declaration was caused by a defective sidewalk on one of the streets in the City of Chicago. The issues were submitted to a jury, resulting in a verdict awarding the plaintiff damages to the extent of $4500.00. Judgment was entered on this verdict. The defendant, by this appeal, seeks to reverse that judgment. After the appeal was perfected in this court, the death of the plaintiff was suggested and the administratrix of her estate was substituted in her stead.

The only contention advanced in this court by the defendant in support of its appeal is to the effect that the verdict of the jury is against the manifest weight of the evidence, on the issue of contributory negligence of the deceased.

On this point the deceased, a woman some 75 years of age, at the time of the occurrence in question, testified that previous to said occurrence, she was in good physical condition;

Opinion filed June 20, 1925.

309 - 5777E

ANNIE W. MORE, admr. of the estate of CORNELIA MILAY, deceased,	
Appellee,	
v.	
CITY OF CHICAGO,	
Appellant.	

Writ of Error to Municipal Court of Chicago.

MR. PRESIDING JUSTICE DUNN delivered the opinion of the court:

The deceased, Cora. Milay, originally brought this action against the City of Chicago, to recover damages caused by injuries she suffered in connection with a fall, which she alleged is her satisfaction was caused by a defective sidewalk on one of the streets in the City of Chicago. The issues were submitted to a jury, resulting in a verdict awarding the plaintiff damages in the amount of $4000.00. Judgment was entered on this verdict. The defendant, by this appeal, seeks to reverse that judgment. After the appeal was perfected in this court, the death of the plaintiff was suggested and the administratrix of her estate was substituted in her stead.

The only contention advanced in this court by the defendant in support of its appeal is to the effect that the verdict of the jury is against the manifest weight of the evidence, as the sole cause of contributory negligence of the deceased.

On this point the deceased, a woman aged 78 years of age, at the time of the occurrence in question, testified that previous to said occurrence, she was in good physical condition;

was able to walk freely and was out practically every day; that on the day in question she was walking with a Mrs. Cohen, in an easterly direction, on the south side of 51st street. They were passing a grocery store, Mrs. Cohen walking on the side next the store and the plaintiff on the side next the street, when suddenly the plaintiff fell to the sidewalk and broke her hip.

There are three photographs in the record, showing the sidewalk in front of this grocery store. These photographs show a sidewalk extending from the stores out to the curb, apparently some 12 feet in width. They disclose two rows of concrete squares or sections, each of which appears to be about 6 feet wide, and also show two of these concrete squares, next to the curb, sunken or depressed at their greatest point to the extent of two or three inches, Thus the joint between the squares, running in the direction of the sidewalk and about at the middle of it, between these sunken blocks and the blocks inside of them shows a difference in level at that point of two or three inches, for several feet. The photographs also indicate that one of the depressed squares was broken across from the curb to the opposite side and some of the concrete was broken out along that line of fracture. It is also shown by the photographs that the concrete curbing was entirely broken away for a distance of almost two of the concrete squares in the sidewalk and at one point this breaking away of the curbing had also carried away a part of one of the concrete squares next to the curbing. It appears from the testimony that the deceased fell on the sidewalk when she reached this depression of the concrete squares, but it does not appear just what it was that caused her to fall.

The deceased testified, in addition to the facts already noted, that the occurrence in question happened at about 4 o'clock

was able to walk freely and was out practically every day; that on the day in question she was walking with a cane. Upon, in an entirely alternative, or the main aim of that trial. They were passing a grocery store. Mrs. Dixon walking on the side next the store and the plaintiff on the side next the street, when suddenly the plaintiff fell to the sidewalk and broke her hip.

There are three photographs in the record, showing the sidewalk in front of this grocery store. Those photographs show a sidewalk extending from the stores out to the curb, approximately some 12 feet in width. They disclose two rows of concrete squares or sections, each of which appears to be about 4 feet wide, and also show two of these concrete squares, each in the curb, sunken or depressed at their greatest point in the extent of two or three inches. Then the joint between the squares, running in the direction of the sidewalk and about at its middle of it, between those sunken blocks was the block inside of them there a difference in level at that point of two or three inches. The photographs also indicate that one of the depressed squares was broken away from the curb in the opposite side and some of the concrete was broken out along that line of fracture. It is also shown by the photographs that the concrete curbing was entirely broken away for a distance of about two of the concrete squares in the sidewalk and at one point this breaking away of the curbing had also carried away a part of one of the concrete squares with it entirely. It appears from the testimony that the concrete fell in the directly where the twelve tile constituent of the concrete squares, but it does not appear just what it was that caused her to fall.

The learned trial judge, in addition to the facts already noted, that the occurrence in question happened at about 4 o'clock

on Saturday afternoon, June 19, 1920; that the way was not clear; there were a great many people on the street at that time but the sidewalk was not clear or else "I would not have been so near the curb. There was a great deal of boxes and obstructions from the grocery store" out on the sidewalk in front of the store, containing fruits and other wares being exhibited for sale; that she and Mrs. Cohen were talking "and the next thing I knew I was down on the sidewalk; I was very near the curb, because I think my clothes were all in the gutter." She testified further that she did not know what made her fall. On cross-examination she testified that she had been in the habit of passing this point on 51st street but that she had not been by there for a week or so; that she had never seen the street as crowded as it was on that Saturday afternoon; that the goods out on the sidewalk in front of the grocery store, presumably belonged to the proprietors of that store; that only a very little part of the sidewalk was not covered by those boxes, which necessitated Mrs. Cohen and the witness passing the store out near the curb-stone. She was asked whether she noticed the condition of the sidewalk there and she said, "No Sir, or I would never have fallen." She was asked "If there had been anything wrong with the sidewalk and if you had been looking, you could have seen it, couldn't you? and she answered, "Yes, I should think so, certainly." She further testified that she had never noticed the sidewalk there before; that she did not know whether the conditions of it was bad or not; that some times she did not pass this way for several weeks, but that she did occasionally; that on the afternoon in question she observed to Mrs. Cohen that the street was very crowded. She was asked, on cross-examination, "As far as you know the sidewalk was in good condition?" and she answered, "Yes Sir." She was then asked, "And you never have observed it being broken or defective?" and she answered, "No". She was shown

on Saturday afternoon, June 13, 1920; that the way was not clear; there were a great many people on the street at that time but the sidewalk was not clear or else I would not have been so near the curb. There was a great deal of noise and excitement from the "nearby state" and on the sidewalk in front of the store, carrying fruits and other women being unlighted for only; that she and Mrs. Dolson were talking "and for some time I knew I was down on the sidewalk; I was very near the curb, because I think my clothes were all in the gutter." The insulting further that she did not know when her fall. On cross-examination she testified that she had been in the habit of passing this place on Elm street but that she had not been by there for a week or so; that she had never seen the street as crowded as it was on that Saturday afternoon; that the people out on the sidewalk in front of the grocery store, presumably belonged in the premises of that store; that only a very little part of the sidewalk was not covered by items before said overturned tub. Dolson and the witness reading the items out near the curb-stone. She was asked whether she noticed the condition of her sidewalk down the week, "Oh no, no I would never have fallen." She was asked "If there had been anything wrong with the sidewalk and if you had been looking, you might have seen it, couldn't you?" and she answered, "Yes, I should think so, certainly." The Fuller testified that she had never noticed the sidewalk there before; that she did not know whether the conditions of it was bad or not; that some times she did not pass this way for several weeks, but that she did occasionally; that on the afternoon in question she observed no fire. Dolson that the street was very crowded. She was asked, on cross-examination, "As far as you knew the sidewalk was in good condition?" and she answered, "Yes Sir." She was then asked, "And you never had observed it being broken or defective?" and she answered, "No". She was shown

the three photographs in evidence and she testified that they represented "the general look of things as I saw it on the day I fell." She testified further that there was nothing to conceal the condition of the sidewalk; that there was a space of 8 or 10 feet between the boxes in front of the store and the street; that as she passed the store she was not looking at the merchandise but was looking straight ahead; that she did not notice the broken condition of the sidewalk, but she did notice how crowded it was. She was then asked, "How close were the other pedestrians to you, about, were they directly in front of you, or four or five feet apart?" and she answered, "Oh yes, very close to me, people back and forth, going back and forth you know", but she added that at the time she fell she did not know that anybody was directly in front of her.

One Kingdon, who had been employed as a clerk in a drug store in the neighborhood for some two years, testified that he would go over 51st street on the way from the drug store, to and from his home, and that he knew where the grocery store above referred to was located. He was then asked whether he had taken "any particular notice of the condition of the sidewalk and curb" in front of that store and he answered, "You could not help but notice it if you walked down the street"; that the sidewalk was broken on the edges and sunken; that some of the curb was broken off and entirely gone; that the sunken part of the sidewalk involved what he referred to as a "section"; that this section was sunken and that it had continued in that condition for some five or six months; that the space between the boxes in front of the store and the sunken section of the sidewalk was three or four feet; that this thoroughfare was more than ordinarily crowded on Saturday afternoons from 4 o'clock to 5:30, when people were out doing their

the three gravestones in question are the territory that was separated "the general lack of dignity on it one day I felt." She testified further that there was nothing in common the condition of the sidewalk; that there was a space of 2 or 3 feet between the house in front of her place and the street; that as she passed the place she was not looking at the memorialize but was looking straight ahead; that she did not notice the broken condition of the sidewalk, but she did notice how crowded it was. She was then asked, "Are there were the other pedestrians in its, short, were they directly in front of you, or four or five feet apart?" and she answered, "Oh yes, very close to me, people back and forth, going back and forth you know", but she added that at the time she fell she did not know that anybody was directly in front of her.

One Hughes, who had been employed as a clerk in a drug store in the neighborhood for some two years, testified that he would go over this street on the way from his drug store, to and from his home, and that he knew where the property store there he ferred to was located. He was then asked whether he had taken "any particular notice at the sidewalks at the sidewalk and said" is true at that store and he answered, "You could not help but notice it if you walked down the street"; that the sidewalk was broken on the edges and sunken; that some of the rock was broken off and entirely gone; that the sunken part of the sidewalk involved what he referred to as a "section"; that this section was sunken and that it had continued in that condition for some five or six months; that the space between the house in front of his store and the sunken section of the sidewalk was three or four feet; that this condition was here the situation prevail at intervals during noons from 4 o'clock to 6:30, when people were out doing their

shopping and marketing; that the depression in this section of the sidewalk was some three or four inches.

One Bobber, employed as a clerk in the grocery store in question, for some 12 years prior to the occasion involved here, testified that the curb had come to be considerably broken, by the settling of the street and by wagons and trucks backing up against it; that the street itself was cracked or sunken and that a "flag" of the sidewalk had become "sagged" to the extent of about an inch and a half in the center and to a greater extent toward the curb; that the width of the entire sidewalk was ten or eleven or twelve and a half feet.

A Mrs. Epstein, whose husband had a place of business in the block in which the grocery store above referred to was located, testified that she was familiar with that block and with the sidewalk in front of the grocery store, and that "it was broken up in two or three places"; and that in June, 1920, this condition had existed for quite a while,- several months; that the photographs in evidence gave a correct impression of the condition of the walk and curb; that the depression in the sunken block in the sidewalk was 2 or 3 inches. On cross-examination counsel for the City asked the witness to point out on one of the photographs in evidence, the depression she had testified to, and she pointed to one or two places, and, in that connection she remarked, "Right here. I fell in this hole several times myself." Counsel asked that this remark be stricken out but there was no ruling. She testified that she has seen the deceased in this neighborhood frequently and that she came to her husband's place of business once or twice a week and when she did she would have occasion to pass over this sidewalk.

charging and wondering; that the depression in this section of the sidewalk was even five or four inches.

The lodger, employed as a clerk in the grocery store in question, for more 22 years prior to the occasion involved here, testified that the path was clear in the morning before, by the testimony of the street lad by wagon and there nothing up against it; that the flower pot itself was straight on top and that a "flag" of the sidewalk had become "sagged" in the amount of about an inch and a half in the center and so a greater amount toward the curb; that the slide of the entire sidewalk was ten or eleven or twelve and a half feet.

A Mrs. Dwelgin, whose husband had a store of furniture in the "block" in which the grocery store above referred to was located, testified that she was familiar with that place and with the sidewalk in front of the grocery store, and that "it was broken up in the by three stones"; and that in June, 1920, this condition had existed for quite a while, several years; that the sagging in evidence gave a serious impression of the condition of the walk and curb; that the depression in the middle block in the sidewalk was 2 or 3 inches. In cross-examination counsel for the city asked the witness to point out on one of the photographs in evidence, the depression she had testified to, and she pointed to one of the planks, and, in that connection she remarked, "Right here. I fell in this hole several times myself." Counsel asked that this remark be stricken out but there was no ruling. She testified that she had seen the depression in this neighborhood frequently and that she came to Mrs Dwelgin's place of business once or twice a week and when she did she would have occasion to pass over this sidewalk.

A Mrs. Block testified that on the occasion in question she was passing over this sidewalk, going west; that she had noticed the unusual condition of the sidewalk in front of this grocery store and when she was asked to describe it she answered, "It was all broken; it was kind of sunken"; and she added that she had occasion to notice this condition of the sidewalk because she wheeled her baby carriage over it every day. She then testified that on the afternoon in question there were many people on the street; that this was in a crowded neighborhood and that Saturday was a very busy day; that there always used to be boxes standing out in front of this grocery store; that she did not remember whether that was the situation on this particular afternoon or not. On cross-examination this witness testified that when the deceased fell, she fell on the sidewalk toward the street and that she fell in the sunken part of the sidewalk; that this sunken place was plainly visible to one who looked at it as they were walking over the sidewalk.

Mrs. Cohen testified that she was with the deceased at the time she experienced her fall; that there were a great number of people on the street that afternoon who were doing their shopping; that as they got up to the grocery store, the deceased fell, "all of a sudden" but she did not know the cause of her fall, but that immediately after she had fallen the witness noticed a hole there near the curbing; that at the time the deceased fell, "we were talking and chatting"; that as they walked past the grocery store they walked out near the curbstone; that there was not very much room; "because people were there, you know, right before us." On cross-examination she testified that they were about 3 or 4 or 5 feet from the store as they passed and she added, "You see there was an obstruction there"; that she did not observe the condition

A Mrs. Black testified that on the occasion in question she was passing over this sidewalk, going west; that she saw assigned the general condition of the sidewalk in front of this property where and when she was asked to describe it she answered, "It was all broken; it was kind of sunken"; and she added that she had occasion to notice this condition of the sidewalk because she wanted her baby carriage over it every day. She also testified that on the afternoon in question three very many people on the street; that this was in a crowded neighborhood; and that Saturday was a very busy day; that there always used to be boxes standing out in front of this grocery store; that on the day of the accident Mrs. Black was the witness on this particular sidewalk when it fell. On cross-examination she testified that when the concrete fell, she fell on the sidewalk leaving the lower end that she fell in the middle part of the sidewalk; that this broken place was plainly visible to one who looked at it as they were walking over the sidewalk.

Mrs. Cohen testified that she was with the witness at the time she experienced her fall; that there were a great number of people on the street that afternoon who were doing their shopping; that as they got up to the grocery store, the witness fell, "all of a sudden" but she did not know the cause of her fall, but that immediately after she had fallen the witness noticed a hole there near the curbing; that as the witness the witness noticed a hole there near the curbing; that as the witness the witness fell, "we were talking and chatting"; that as they walked past the grocery store they walked out near the curbstone; that there was not very much room; "because people were there, you know, right before us." On cross-examination she testified that they were about 2 or 3 in a line from the store as they passed and she added, "I'm sure there was an obstruction there"; that she did not observe the condition

of the walk before they came to it; that they were not looking down, they were looking up; that there were a great many people on the sidewalk at the time; that the closest pedestrians were "very close on the inside, and there were some on the outside. I don't remember exactly. There were a great many. It was Saturday afternoon as I told you. They were shopping people, for Sunday." She further testified that if she had been looking down toward the sidewalk she could have observed its condition; that there was a big hole there,- apparently referring to the depression in the sidewalk.

The defendant submitted no evidence but the issues involved were submitted to the jury on the evidence introduced in behalf of the deceased alone. The question of whether, under all the circumstances disclosed by the evidence, the deceased was in the exercise of due care on the occasion in question, was left to the jury as a question of fact, and by their verdict the jury decided that she was in the exercise of due care. It is now the contention of the defendant that the verdict on that issue is against the manifest weight of the evidence. In our opinion that contention is not tenable.

The facts involved in the case at bar are, in a number of respects, materially different from those involved in the case of Harris v. City of Chicago, General No. 27773, in which case we are this day handing down an opinion. Nor are the issues the same in the two cases. In the case at bar, the evidence shows that in front of this grocery store there had come to be something of a depression in the street, and in approximately the outside half of the sidewalk, that depression involved, so far as the sidewalk was concerned, two concrete sections. This depression

of the walk before they came to it; that they were not looking down, they were looking up; that there was a great many people on the sidewalk at the time; that the sleeper description was "very close on the inside," and that were some on the outside. I don't remember exactly. There were a great many. It was Saturday afternoon as I told you. They were shopping people. The Tuesday,[4] the former testified that if the bed been looking down towards the sidewalk she would have observed its position; that there was a 'fit bits in,' apparently returning to the sidewalk in the direction.

The testimony adduced on evidence and the issues involved were submitted to the jury on the evidence introduced in behalf of the defendant alone. The question of standing, under all the circumstances disclosed by the evidence, the conceded use in the operation of the car to the permission to proceed, was left to the jury as a question of fact, and by their verdict the jury decided that she was in the exercise of due care. It is now the contention of the defendant that our verdict on that issue is against the manifest weight of the evidence. In our opinion that contention is not tenable.

The facts involved in the case at bar are, in a broad sense of respects, materially different from those involved in the case of Dantzler v. City of Chicago, Supra, 177 Ill. in which case we for this day handing down an opinion. We are the issues the same in the two cases. In the case at bar, the evidence shows that in front of John Crosby there was some to be something of a concourse in the street, and in approximately the middle half of the sidewalk, that depression involved, so far as the sidewalk was concerned, for motorist purposes. The [illegible]

had also resulted in the breaking of the curbstone so that the latter was entirely removed for a distance of approximately two concrete sections of the sidewalk, and this breaking away of the curbing had caused a breaking away of one of these sidewalk sections, to some small extent. It further appears from the evidence that a considerable portion of the sidewalk space next to the building line opposite this grocery store, was taken up with a display of goods, by the proprietor of the store, which reduced the sidewalk space, available for pedestrians, to a width not much greater than that occupied by the depressed sections, which have been referred to, and it is also shown that on the afternoon in question, there were a good many people passing along this sidewalk. Although the evidence shows that at the time the deceased experienced her fall, she was talking or chatting with her companion, it does not show that this diverted her attention to any extent, for she testified that as she walked along she was looking straight ahead.

It will be seen from the above reference that has been made to all the facts, as disclosed by the testimony, this was not a case where the deceased was deliberatly walking over a sidewalk which was defective, under circumstances which left these defects in full and unobstructed view. In addition to the fact that the sidewalk was more or less crowded, the evidence shows that the obstructions which the proprietor of the grocery store was permitted to maintain on the sidewalk in front of his store, made it practically necessary for pedestrians to walk over the part of the sidewalk which was depressed. The photographs in evidence indicate that for the length of the two concrete sections in question, the outside half of the sidewalk was two or three inches lower than the inside half, the line of different levels being

had also resulted in the breaking of the supposition so that the latter was suitably removed for a distance of approximately the ordinate position of the sidewall. And this showing was of the marking but having a position very of not of these sidewalk sections, so some small amount. It further appears that the sidewalk space the sidewalk space near to the building line towards still towards where, was below by with a display of goods, by the proprietor of the store, which reduced the sidewalk space, resulting for pedestrians, in a much not much greater than that attached to the appurtenance sections which have been entered by. And it is also seen that on the afternoon in question, there were a very many people passing along this sidewalk. Although the evidence does tend of the line the passenger appreciated her fall, who was holding on something with her companion, it does not come that this disturbed her attention to any extent, for she testified that she also walked along the passing straight ahead.

It will be seen from the above reference that has been made to all the facts, as disclosed by the testimony, this was not a case where the injured was suddenly walking over a sidewalk which was defective, under circumstances which left there defects in full and unobstructed view. In addition to the fact that the sidewalk was bare or less covered, the evidence shows that the obstructions which the proprietor of the grocery store was permitted to maintain on the sidewalk in front of his store, made it practically necessary for pedestrians to walk over the part of the sidewalk which was defective. The photographs in evidence indicate that for the length of the two concrete sections in question, the outside half of the sidewalk was be or since inches lower than the inside half, the line of difference being some

the line between the outer row of concrete sections and the inner row. It will readily be seen that if any one passing over this sidewalk and not noticing the difference in levels at this point, happened to put their foot down over this middle line, a turn of the ankle would be very likely to cause them to fall to the sidewalk. It is also apparent, from the photographs, that the depression of these two sections had caused breakages in the concrete surface of the walk at several points where the same thing might have occurred.

The defendant does not contend that the evidence is insufficient to support the finding of the jury to the effect that the deceased was caused to fall by reason of the defective sidewalk, nor do we believe such a contention could be made successfully. Material defects in this sidewalk were proven. The proprietor of the adjoining grocery store was permitted to occupy a considerable portion of the sidewalk with a display of his goods, so that passers-by were obliged to walk over this defective part of the sidewalk. The deceased fell just at the point where these defects were located. The jury were instructed that before they could return a verdict for the plaintiff, they must believe from a preponderance of the evidence that the defects alleged, existed and were permitted to continue by reason of the defendant's negligence and that "such negligence was the proximate and direct cause of the injury complained of" and they were further instructed that if they believed "from a preponderance of the evidence under the instructions of the court, that the accident in question was proximately caused by the plaintiff merely falling on the sidewalk in question, and that it was not caused by any defective conditions of the sidewalk itself, then you should find the defendant, City of Chicago, not guilty."

the line between the water row of concrete sections and the lower row. It will readily be seen that if any one passing over this sidewalk had not noticing the difference in levels at this point, happened to put their foot down over the middle line, a turn of the ankle would be very likely to cause them to fall to the sidewalk. It is also apparent, from the photographs, that the depression of these two sections had caused breakages in the concrete surface of the walk at several points where the same thing might have occurred.

The defendant does not contend that the evidence is insufficient to support the finding of the jury to the effect that the deceased was caused to fall by reason of the defective sidewalk, nor do he believe such a contention could be made successfully. Certainly there is ample evidence.

The proprietor of the adjoining grocery store was permitted to carry a [illegible] particular at his sidewalk sign a [illegible] of his goods, so that pedestrians were obliged to walk over this defective part of the sidewalk. The deceased fell just at the point where these defects were located. The jury were instructed that before they could return a verdict for the plaintiff, they must believe from a preponderance of the evidence that the defendants alleged, existed and were permitted to continue by reason of the defendants's negligence and that "such negligence was the proximate and direct cause of the injury complained of" and they were further instructed that if they believed "from a preponderance of the evidence under the instructions of the court, that the accident in question was proximately caused by the plaintiff merely falling on the sidewalk in question, and that it was not caused by the defective condition of the sidewalk itself, then you should find the defendant, City of Chicago, not guilty."

On the evidence in the record, we are of the opinion that it cannot be said that the verdict of the jury is against the manifest weight of the evidence on any of the issues involved.

For the reasons stated, the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

Opinion filed June 20, 1923.

305 - 27781

F. M. HOYT CO., a corp., Appellee, v. M. J. KASZESKI, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant seeks to reverse a judgment for $893.30, recovered against him in the trial court, in an action brought by the plaintiff to recover the amount claimed to be due the plaintiff by the defendant for goods sold and delivered. The issue involved by the amended pleadings covered one item of merchandise, which, as given in the statement of claim, read, "Nov. 1, 1919, Mdse. as per bill rendered, $893.30." In his affidavit of merits the defendant alleged that he never received that bill of goods at any time and that the plaintiff had never submitted a bill to him calling for payment of any such shipment.

Certain interrogatories were propounded to the plaintiff by the defendant and these with the answers thereto were introduced in evidence by the defendant.

One Krause testified for the plaintiff, that he was in the tanning business and that on November 21, 1919, he delivered six cases of shoes for the plaintiff to the defendant's place of business and that the defendant's wife receipted for them on the delivery sheet. He was asked whether he received a bill of lad-

ing, then exhibited, from the plaintiff on November 1, and he said he could not say whether he did or not. The original delivery sheet referred to was introduced in evidence.

One Kramer, a salesman for the plaintiff, testified that on June 18, 1919, he took an order from the defendant for an order of shoes. This order was set out at length in writing, on one of the forms used by the plaintiff. This order contained, among other notations, the following: "Ship about 9/1/19"; and "shipped part 10/19 - Nov. 1, 1919." On the reverse side of this order, there appeared the following notation:

	"$1752.10
10/9	851.80
	900.30
1 pr.	7.
	893.30

Nov. 1, 1919."

The plaintiff's contention is that this memorandum indicated that the total amount of the order was $1752.10; that on October 9, there was a shipment totaling $851.80; that there was a credit for one pair of shoes, amounting to $7.00, leaving the order to be filled to the extent of $893.30 and that this part of the order was shipped on November 1. This order number was 3240.

Kramer testified further that he had a talk with the defendant about November 1, and at that time the defendant said he was arranging to move his store and would like to have the shoes which were to be shipped from plaintiff's factory in New Hampshire, sent to the plaintiff's Chicago branch and held there until the defendant was in his new location. The witness referring to a column of numbers on the order which has been re-

ing, then omitted, from the plaintiff's October 3, and is said to be merely not any whether in fact or not. The original demurrer which relied in the indictment is overruled.

One element, a reference for the plaintiff, testified that on June 12, 1918, he sent a letter from the defendant for an order of stock. This letter was not yet at length in evidence, but one of the items sent by the plaintiff. This order contained, among other matters, the following: "Only since 6/1/18"; and "Shipped June 12/18 - 500gal. 1918." In the previous letter of this order, which mentions the following material:

"Sept.12

10/9

Sept.

2 yr.

Nov. 1, 1918."

The plaintiff's contention is that this memorandum indicated that the total amount of the order was $1258.50; that on October 1, there was a shipment amounting 1000.00; that there was a credit for one gale of stock, amounting to $7.50, leaving the order to be filled in the amount of $250.00 and that this part of the order was shipped on November 1. This other claim was made.

Among testified further that on June a bill was the defendant about October 1, and at that time the reference was be was arranging to have its stock and until like to make the same claim were to be charged from plaintiff's letter to the Company, and to the plaintiff's Company should not hold here until the 1st account was in the new business. The witness referred to a column of numbers on the right which has been re-

ferred to, identified them as lining numbers stamped on the linings of the shoes which were used to identify them in case of reordering; that these numbers identified the style of the shoe. He was asked whether these numbers were ever repeated and he answered that he did not know,- that he thought not,- "they ought not to be." On cross-examination he testified he could not say that the conversation he had testified about as occurring between him and the defendant about November 1, referred to the order involved in this case.

This witness testified further, that he could not recall seeing the six cases onwhich the suit at bar is based; that he could not say positively whether these goods were received by the plaintiff's Chicago branch nor could he testify that they had been delivered to the defendant.

The plaintiff introduced in evidence a credit memorandum dated March 18, 1920, by which the defendant was credited with a quantity of shoes apparently returned to the plaintiff. These various items of credit, as appearing on that memorandum gave the different lining or style numbers and some of these numbers are the same as those appearing on order No. 3240.

The plaintiff than rested its case. Counsel for the defendant then pointed out that no proof had been submitted to the effect that the shipment on which this suit was based had not been paid for and a motion for a finding for the defendant was made. Counsel for plaintiff then asked leave to open his case. This was allowed and he then called one Smith to the stand but after a few questions withdrew him and then called the defendant, under section 33, and he testified that he received a shipment of goods on November 21, 1919, amounting to $851.80, and

forced to, identified them as living monkeys shipped in the line-
ings of the boxes which were used to identify them in case of re-
ordering; that these monkeys identified the angle of the cheek.
He was asked whether these monkeys were ever examined and he an-
swered that he did not know, but he thought they "May again
get to be." He cross-examination he identified his notes and say
that the correspondence he had identified about arranging the
meeting him and the defendant about December 7, relating to the
order involved in this case.

This witness identified Exhibits, then he rests and re-
call saying the bar memorandum on that at 4pm in evening; that
he could not say positively whether [illegible] or it was received
by the plaintiff's chicago branch nor could he positly that they
had been delivered to the treasurer.

The plaintiff introduced in evidence a crude warrany-
ran dated June 12, 1928, by which the defendant was obligated
with a liability of three cigarettes delivered to the plaintiff.
These various lines of evidence, accompanying the bar memorandum
gave the different living or angle numbers and some of those
numbers are too close to view excluding an error on. Exhibit.

The plaintiff then rested. In rebuttal for the
defendant then pointed out that no proof has been adduced to
the effect that immediately on dick's offer and acceptance
not been made for and a notice for a finding for the defendant
was made. Counsel for plaintiff then moved leave to open the
case. This was allowed and he then called and testified the chief
but after a few questions withdrew his and then called the defend-
ant, under section 58, and he testified that he received a ship-
ment of goods on October 20, 1928, according to Exhibit 88, and

that the bill for that shipment had been paid. The interrogatories and answers, heretofore referred to were read to the court, who was hearing the case, without a jury, and were considered as admitted in evidence, although the record does not show that they were formally offered. (They were later formally offered by counsel for the defendant.) These interrogatories were answered by one Burbank, plaintiff's assistant treasurer and accountant. His answers were to the effect that plaintiff shipped a bill of goods to the defendant on November 1, 1919, amounting to $893.30. He then submitted an itemized list of the goods involved, giving the numbers appearing on the cases in which the shoes were packed, which numbers were 80 to 85 inclusive, and also giving the lining numbers. His further answers were to the effect that this shipment had been delivered to the defendant; that at defendant's request by letter, the goods had been consigned to plaintiff's Chicago branch, as per copy of bill of lading attached to the answers. This bill of lading called for six cases of shoes "80/85", (apparently the case numbers) delivered to the railroad by the plaintiff, at Manchester, New Hampshire, on November 1, 1919. His answer further was that this shipment was "subsequently accepted by defendant from Chicago branch"; that on November 30, 1919, there was due and owing the plaintiff from the defendant, $893.30, as shown by plaintiff's books; that on October 9, 1919, another bill of goods was shipped to the defendant which was set out by Exhibit, in detail, giving case numbers 1189 to 1195 inclusive, and also the various lining numbers; that this shipment, by reason of defendant's aforesaid request, was also shipped to plaintiff's Chicago branch and was subsequently "accepted by defendant from Chicago branch"; that there was a shortage on the shipment of October 9, amounting to $7.00; and

that the bill for that shipment had been paid. The interchangeable
and numerous, particulars relating to which had to be given, who
was handling the case, without a doubt, had been considerable an
mitted in evidence, although the income did not show that they
were financially affected. They were later formally advised by com-
ing for the defendants. These circumstances were measured by
the Bailiff, principally according to the evidence. The
answers were to the effect that plaintiff filed a bill of lading
in the defendants on January 1, 1919, amounting to $2000.00. In
them exhibited an itemized list of the goods involved, giving the
numbers appearing on the cases in which the goods were packed,
which numbers were 80 in 80 instances, the list giving the ide-
ing numbers. The further answers were to the effect that this
shipment had been delivered to the consignee; that as between
and's respect to liability, the goods had been consigned to plain-
tiff's Chicago branch, on the order of that of plaintiff's
in the amount. This bill of lading called for the use of
above "CO/OP", (apparently the name number) delivered to the
received by the plaintiff, at Guanacaste, for Bangkok, on Nov-
ember 1, 1919. The cause further was that the shipment was
"subsequently assigned to defendants (the Chicago branch) that
on December 10, 1919, there was due and owing the plaintiff from
the defendant, $2000.00, as shown by plaintiff's books; that on
October 9, 1920, another bill of goods was shipped to the defend-
ant which was not paid by Bangkok, in Canada, leaving some numbers
123 to 125 inclusive, and also the various listed numbers; that
this shipment, by order of defendant's attorneys received, was
also subject to plaintiff's Chicago branch and was subsequently
transferred to "Central Fruit Distributors Limited"; that there was a
shortage on the shipment of October 9, amounting to $2.00; and

that "the exact amount shown to be due the plaintiff from the defendant on the plaintiff's books after allowing to the defendant all of his just credits, deductions and set-offs," was $907.30, as per statement attached to the answers. This statement showed a debit item of $851.80, under date of October 9, 1919. This is the shipment defendant had testified he received on November 21, for which he had paid. The statement then showed a credit item, consisting of a check dated November 28, 1919, amounting to $834.77, and an item of discount of the same date, amounting to $17.03, these two items of credit balancing the debit item of October 9. Then followed two debit items, one dated November 1, 1919, of $893.30, (the item involved in this case) and one dated December 1, 1919, amounting to $1115.70, these two aggregating $2009.00. Then followed several credit items, running along from January 30 to March 22, totaling $1101.70, leaving a balance of $907.30. There was a further item included in the statement of claim amounting to $14.00 for which defendant claimed he should be credited and plaintiff did not contest this. Deducting this amount from the balance of $907.30, leaves $893.30, the amount for which the court entered judgment against the defendant.

After these interrogatories and answers had been read to the court, the plaintiff again rested and the defendant again renewed his motion and it was denied.

The defendant then testified that he received no goods on November 1, 1919, amounting to $893.30, but that he did receive a bill of goods on November 21, 1919; that the goods received on that date were those shown on a bill received from the plaintiff and then introduced in evidence. This bill was dated October 9, 1919. It included a number of items and covered cases numbered from 1189 to 1195 inclusive. It amounted to

that "the court cannot seem to be rid the plaintiff from the defendant on the plaintiff's books after claiming it the defendant and all of his just credits, deductions and set-offs," see §907.30, as per statement attached to the answers. This statement showed a debit item of $881.80, under date of October 6, 1919. Note in the shipment document has certified to provided or December 31, for which he had paid. The shipment then caused a credit item, amounting of a note issued December 6, 1919, amounting to $24.77, and an item of discount of the same date, amounting to $17.50. Those two items of credit amounting one debit item of October 2. Then followed two debit items, one dated November 3, 1919, of $1111.30, (the item involved in this case) and one dated December 1, 1919, amounting to $1110.70. Then the corresponding $1000.00. Then followed several credit items, reading first January 30 to March 25, totaling $1087.70, leaving a balance of $807.30. There was a further item included in the statement of claim amounting to $14.00 for which defendant claimed he also had be credited and plaintiff did not credit him. Including this amount then the balance of $820.30, leaves $822.30, the amount for which the court ordered judgment against the defendant.

After these interrogatories and answers had been read to the court, the plaintiff again rested and the defendant again renewed his motion and it was denied.

The defendant then testified that he received no goods on November 1, 1919, amounting to $822.30, but that he did receive a bill of goods on November 21, 1919; and the goods received on that date were those shown on a bill received from the plaintiff and then introduced in evidence. This bill was dated October 6, 1919. It included a number of items and numbers were numbered from 1128 to 1182 inclusive. It amounts to

$851.80. It was all typewritten, except that under the total amount of the bill, $851.80, there appeared in ink "$17.03", under which a line was drawn, and under that, in ink, the amount, "$834.77." On the back of this bill there appears in pencil, the following, "Received from F.M. Hoyt Shoe Co. Nov. 21 - 1919, 6 cases of shoes and 14 pair. Helen M. Kaszeski." It will be seen that this bill covers seven cases of shoes and not six. This is the bill covering the October shipment made under order No. 3240, according to the answers of Burbank. According to the statement attached to Burbank's answers, it was paid for on November 28, 1919 by a check for $834.77, and a discount memorandum of $17.03. These figures correspond to the figures appearing in ink on the face of the bill, as introduced by the defendant.

Defendant introduced his check, which he says paid for the shipment of shoes received on November 21. The check is for $834.77. It is dated November 22, 1919. This is the credit item appearing on the statement attached to plaintiff's answers to the interrogations submitted by the defendant, the item there appearing under date of November 28. From endorsements appearing on the reverse side of this check, it appears it went through a Philadelphia bank on December 1, and through the Chicago Clearing House on December 2.

Defendant next introduced a bill from plaintiff for another lot of goods. This bill was dated December 1, 1919. Defendant testified he received the goods covered by that bill, on December 24, 1919. The bill amounted to $1115.70. It refers to nine cases of shoes, numbered 80 to 88 inclusive.

The defendant testified he never received any bill for a shipment of goods of November 1, 1919. He introduced in evi-

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$821.80. It was all typewritten, except that under the total amount of the bill, $821.80, there appeared in ink "$17.03", under which a line was drawn, and under that, in ink, the amount, "$834.77." On the back of this bill there appears in pencil, the following, "Received from F.E. Hoyt Shoe Co. Nov. 21 - 1919, 6 cases of shoes and 1¢ paid. Helen K. Kanonsky." It will be seen that this bill covers seven cases of shoes and not six. This is the bill covering the October shipment made under order No. 3440, according to the answers of Burbank. According to the statement attached to Burbank's answers, it was paid for on November 22, 1919 by a check for $834.77, and a discount memorandum of $17.03. These figures corresponding to the figures appearing in ink on the face of the bill, as introduced by the defendant.

Defendant introduced his check, which he says paid for the shipment of shoes received on November 21. The check is for $834.77. It is dated November 22, 1919. This is the credit item appearing on the statement attached to plaintiff's answers to the interrogatories submitted by the defendant, the item there appearing under date of November 20. From endorsements appearing on the reverse side of this check, it appears it went through a Philadelphia bank on December 1, and through the Chicago Clearing House on December 2.

Defendant next introduced a bill from plaintiff for another lot of goods. This bill was dated December 1, 1919. Defendant testified he received the goods covered by that bill, on December 24, 1919. The bill amounted to $1113.70. It returns to nine cases of shoes, numbered 80 to 88 inclusive.

The defendant testified he never received any bill for a shipment of goods of November 1, 1919. He introduced in evi-

dence, two letters from the plaintiff. One was dated January 30, 1920, and advised the defendant that plaintiff's books then showed his account past due to the extent of $1115.70. The other one was dated March 4, 1920, and referred defendant to his invoice of December 1, 1920 for $1115.70, still remaining unpaid.

The defendant testified that he was not in his store on November 21, 1919, when a delivery of shoes was made but that his wife showed him the bill for $851.30, as soon as he got back and he checked them off and found the goods delivered to be those shown on the bill.

The defendant testified onredirect examination that when he got home he found seven cases of shoes there. "Six cases was not opened at all; one case was opened and two pairs were gone out of it." Counsel then asked, "Five cases were intact?" and defendant answered "Six cases and the package, fourteen pairs; that is what we received." This doubtless explains the notation on the reverse side of the bill, signed by defendant's wife which reads, "Received from F. M. Hoyt Shoe Co. Nov. 21 - 1919, 6 cases of shoes and 14 pair."

On recross examination the defendant testified plaintiff delivered six cases of shoes on November 21. He had previously referred to seven cases, saying he found six cases intact when he arrived home on that day and "one case" opened with two pairs of shoes missing and fourteen remaining.

The witness Kramer was recalled and testified that the defendant had a 30 day credit with the plaintiff and that he never had this account now being sued for sent to him by the plaintiff for his attention or collection. He testified that in the fall of

1919 shipments from plaintiff's factory in New Hampshire would come through to Chicago in from ten days to two weeks.

According to plaintiff's theory of the case Order No. 3240 was filled by two shipments, one made October 9, and the other November 1. The one of October 9, consisted of seven cases of shoes. The one of November 1, here being sued upon, consisted of six cases of shoes. Copies of the invoice covering these two shipments were attached to the answers of plaintiff to the interrogatories submitted by the defendant. These invoices give the lining or style numbers, the number of pairs of each and a memorandum description of each item. Order No. 3240 contains two items not found on either invoice, namely lining number "73300, 12 pair Cordo. Russ. Butt" and lining number "64530, 18 pr. Cordo Russ. Blu." There were two corresponding items on the invoices not to be found on Order 3240. The invoice of November 1, (the one sued upon here) includes an item reading (lining number) "72000, 12 pr. Cordo. Russ. Butt." and the invoice of October 9, includes an item reading (lining number) "74530, 18 pr. Cordo. Russ. Blu." It will be seen that the two items found in the order and not included in the invoices and the two items included in the invoices but not found in the order, correspond precisely in quantity and in the memorandum of description but not in the lining or style numbers. With that exception, the two invoices exactly cover all the items making up the order, except as to one pair of shoes on which there was a proper credit given and over which there is no dispute.

There is some evidence in the record referring to other ship-

1919 shipments from Scientific Factory in New Hampshire was [illegible] to indicate it was not up to the mark.

According to Scientific's history of the case (page 5), 3260 was filled by the engineers, are made October 8, and the other November 6. The one of October 8, consisted of seven cases of shoes. The one of November 6, have being made upon, consisted of six cases of shoes. Copies of the invoice covering these the engineers were attached to the answers of plaintiff to the interrogatories submitted by the defendant. These invoices give the labels of fifty cases, the number of pairs of each and a measurement description of each item. Under No. 3260 contains six items and 24 shoes invoice, namely listing number "12300, 12 pair Dress. Same" and listing number "12300, 12 pr. Dress case. Ex." Under the descriptions alone on the invoices not to be found on Crane Co. the invoice of November 6, (the one used upon trial) includes six items reading listing number "12300, 12 pr. Dress. Case. Best." and the invoices of October 8, includes six items reading listing number "12300, 12 pr. Dress. Case." It will be seen that the two items found in the order and not included in the invoices and the one item included in the invoices but not found in the order, necessarily necessitate an inquiry as to the numbers of complaints not in the listing of fifty numbers. With that exception, the six invoices exactly cover all the items making up the order, except as to the part of shoes on which there was a medical strap and very slight [illegible] in dispute.

There is some variance in the record referring to white-

ments of shoes by the plaintiff to the defendant, one shown by invoice dated December 1, 1919, and another shown by invoice dated November 6, 1919. Neither one had anything to do with this case. Neither one contains any item to be found in Order No. 3240.

The credit slip issued by the plaintiff to the defendant under date of March 18, 1920, contains 21 items. Of these, five involve lining numbers appearing on the bill of goods plaintiff is suing for which plaintiff claims were delivered November 21. None of these lining numbers appear on the bill of goods the defendant claims is the one he received that day. There are 5 other items of credit on this memorandum which do involve lining numbers appearing on the bill of goods defendant claims is the one he received on November 21. According to plaintiff's theory of the case, that bill of goods was received earlier.

Admittedly there was a delivery of goods by the plaintiff to the defendant on November 21, 1919. Plaintiff contends it was a shipment of six cases of shoes, amounting to $893.30. Krause testifies to a delivery of six cases. That is the quantity appearing on his delivery sheet, in evidence, signed by defendant's wife. The invoice for that shipment has never been paid by defendant. The latter claims the shipment he received on the date in question amounted to $851.80. The invoice introduced by defendant on this shipment is dated October 9, 1919. The original order shows part of it shipped by plaintiff on that day. The bill of lading on this shipment shows delivery to the railroad on that date. The invoice calls for seven cases of shoes, as does the bill of lading. On the

back of the invoice there is a memorandum signed by defendant's wife, showing receipt on that day of six cases and fourteen pair of shoes. In his testimony defendant in telling about checking over the shoes delivered to his place of business onthat day, refers distinctly to seven cases, six intact and one opened with two pair gone and fourteen remaining.

In our opinion the trial court was justified in concluding that the shipment delivered to the defendant on November 21, was not the seven case shipment claimed by the defendant but the six case shipment, indicated by the delivery sheet of the expressman Krause. That this six case shipment was delivered to the defendant, is further indicated by the fact that the following spring the plaintiff sent the defendant a credit memorandum containing five items of credit representing shoes returned by defendant to the plaintiff, which contain lining or style numbers not to be found in the invoice covering the seven case shipment but which are found in the invoice covering the six case shipment, on which this suit is based. Defendant does not show that he received shoes containing these lining or style numbers under any other order.

We are not unmindful of the contentions of counsel for defendant to the effect that the case numbers appearing on the invoice here sued upon, are to be found on a later invoice covering a shipment in December and that plaintiff's letters to defendant in January and March 1920, referring to defendant's over due account involve only the amount of the invoice covering the December shipment and do not refer to or include the amount of the invoice involved here, on which plaintiff claims delivery was made on November 21. Those facts are not explained. It may be said they are not consistent with plain-

back of the lavolos there is a mysterious figure by artemis, a site, showing nevsky on that day of six, seven and three pair of cheek. In the national [illegible] in [illegible] about changing over the date celebrated on six times of that. mere orthos day, where distinctly in seven years, six latest and one opened with two pair [illegible] [illegible] [illegible].

In one opinion the trial court was justified in concluding that the objects delivered to the defendant on seven- ber 21, was not the seven mere alignment claimed by the defend- ant but the six mere alignment, indicated by the arrangement of the accessories there. Does this the mere alignment con- tained to the defendant, is further indicated by the fact that the [illegible] during the [illegible] the defendant a weekly maximum containing five issue of weekly newspaper phone returns by defendant to the [illegible], [illegible] [illegible] or style number not to be found in the lavolos without the seven mere alignment but which are found in the lavolos covering the six mere alignment, on which this suit is based. Defendant does not claim that he received phone containing [illegible] or style number [illegible] any other order.

We are not unmindful of the contention of counsel for defendant to the effect that the mere numbers appearing in the lavolos here sued upon, are, if we find as a later [illegible] covering a difference in numbers and that distinctly indicates to defendant in [illegible] and [illegible], referring to [illegible] and's [illegible] [illegible] only the amount of the lavolos covering the numbers mentioned and do not refer to or include the amount of the lavolos involved here, on which [illegible] claims [illegible] [illegible] [illegible]. These facts are not [illegible]. If they be such they are not consistent with plain

tiff's contentions onthe invoice in question. But, in our opinion, they are in no way decisive. On the other hand, it may be said that the evidence does not show any complaint from defendant based on an alleged failure of plaintiff to deliver practically half of the order No. 3240. If there was such a failure, in fact, it would certainly be likely that the defendant would be found complaining about the delay. The order was, according to the notation on it, for fall delivery "about 9/1/19."

The only disputed point about this bill of goods, being sued upon, is that of delivery. In our opinion, sufficient evidence appears in the record to show there was delivery. Certainly we could not say on this record that the finding of the trial court, to that effect, is against the manifest weight of the evidence.

For the reasons stated, the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

Opinion filed June 20, 1923.

314 - 27790

AMERICAN LAW BOOK COMPANY, a corporation, Appellee,	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	
MOYER J. STEIN, Appellant.	

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

The plaintiff filed its statement of claim on November 10, 1920, alleging that the defendant owed it $261.24, for goods sold and delivered. Summons was duly served on the defendant, and on the return day, November 30, 1920, he was defaulted for want of appearance and affidavit of merits, and a judgment was duly entered against him and in favor of the plaintiff, in the sum sued for.

On September 14, 1921, the defendant filed his special appearance for the purpose of making his application to vacate the judgment of November, 1920. Apparently on the same day the defendant filed his petition to vacate the judgment in which he set up that he is a lawyer; that at the time the judgment was entered he was absent from the City of Chicago and that since that time he has been employed in the exercise of his profession in the City of Springfield. By his petition the defendant further alleged that at the time of the institution of this suit the plaintiff was a corporation organized and existing under and by virtue of the laws of the State of New York, and that it was then engaged

Opinion filed June 27, 1934.

G14 - 27752

AMERICAN LAY [illegible] COMPANY, a corporation, Appellee,	
v.	
[illegible] C. [illegible], Appellee.	

Mr. JUSTICE [illegible] delivered the opinion of the court.

The plaintiff filed its statement of claim on December 19, 1930, alleging that the defendant owed it $[illegible], for goods sold and delivered. Summons was duly served on the defendant, and on the return day, November 27, 1930, he was defaulted for want of appearance and affidavit of merits, and a judgment was duly entered against him and in favor of the PLAINTIFF, in the sum aforesaid.

On September 14, 1933, the defendant filed his special appearance for the purpose of making his application to vacate the judgment of November, 1930. Apparently on the same day the defendant filed his petition to vacate the judgment in which he set up that he is a lawyer; that at the time the judgment was entered he was absent from the city of Chicago and that since that time he has been employed in the executive of his profession in the city of Springfield. By his petition the defendant further alleged that at the time of the institution of this suit the plaintiff was a corporation organized and existing under and by virtue of the laws of the State of New York, and that it was then engaged

in doing a domestic business in the City of Chicago, without having procured a license as a foreign corporation, as required by the statutes of Illinois; that plaintiff therefore had no legal right to invoke the jurisdiction of the Municipal Court and maintain this suit before complying with the statutes relating to the admission of foreign corporations to the State of Illinois; that by virtue thereof, the Municipal Court had no jurisdiction to enter the judgment appealed from and that said judgment is therefore void; and that the subject of this suit is not interstate commerce but a local transaction consummated wholly within the State of Illinois.

The record shows that upon presentation of this petition to the court, the defendant moved that the judgment in question be vacated and set aside, to which motion the plaintiff objected and the court sustained the objections and overruled defendant's motion to vacate the judgment, and entered an order accordingly. To reverse that judgment the defendant has perfected this appeal.

In our opinion, the petition was insufficient. A foreign corporation may sue a citizen of Illinois in our State or Municipal Courts without complying with the provisions of our Corporation Act, with relation to foreign corporations, which provisions apply only to those foreign corporations which may be said to transact business in this State. Section 94 of chapter 32 of our statutes, which the defendant invokes, is not to the effect that any foreign corporation, not having a license to do business in this State, shall be permitted to maintain any suit at law in any of our courts but that no such corporation "doing business in this State without a license" shall be permitted to maintain any such suit.

in doing a domestic business in the City of Chicago, without having procured a license as a foreign corporation, as required by the statutes of Illinois; that plaintiff therefore had no legal right to invoke the jurisdiction of the Illinois Court and maintain this suit before complying with the statutes relating to the admission of foreign corporations to the State of Illinois; that by virtue thereof, the municipal Court has no jurisdiction to enter the judgment appealed from and that said judgment is therefore void; and that the subject of this suit is not intrastate commerce, but a local transaction commenced wholly within the State of Illinois.

The record shows that upon presentation of this petition by the court, the defendant moved that the judgment in question be vacated and set aside, on which motion the plaintiff objected and the court sustained the objections and overruled defendant's motion to vacate the judgment, and entered an order accordingly. To review that judgment the defendant has perfected this appeal.

In our opinion, the position was insufficient. A foreign corporation may sue a citizen of Illinois in an State or Municipal Court without complying with the provisions of the "Corporation Act", with reference to foreign corporations, which provisions apply only to those foreign corporations which may be said to transact business in this State. Section 84 of chapter 32 of our statutes, which the defendant invokes, is not to be the effect that any foreign corporation, not having a license to do business in this State, shall be permitted to maintain any suit at law in any of our courts but that no such corporation doing business in this State without a license shall be permitted to maintain any such suit.

If the plaintiff is a foreign corporation engaged in business in another state, and its custom is to sell and deliver its goods to purchasers in this state, through salesmen, and without having any office or place of business here, it is engaged in interstate commerce and is not subject to the requirement of qualifying itself to do business in this State as a foreign corporation before making such sales or instituting any action in our courts. Lehigh Cement Co. v. McLean, 245 Ill. 326.

It is apparent from the allegations of the defendant, included in the petition, that he appreciated this state of the law, for he alleged that the plaintiff "was engaged in doing domestic business in Chicago * * * without a license as a foreign corporation so to do", and that "the subject of this suit is not interstate commerce but the same was a local transaction consummated wholly within the State of Illinois." In our opinion those allegations are not sufficient to support the defendant's motion or petition to vacate the judgment. They are merely conclusions of the petitioner. To make out a proper petition it should allege facts sufficient to show that the plaintiff was a foreign corporation and that the transaction, sued upon, involved doing business in this state within the meaning of the statute. The petition sets forth no such facts.

It might have been more formal if the plaintiff had taken such action as would have amounted to a demurrer to the petition, by moving to strike it for insufficiency, but we shall treat the plaintiff's objections to the defendant's motion for an order vacating the judgment, in compliance with the prayer of the petition, as amounting, in effect, to a demurrer to the petition or a motion to strike it.

In our opinion, the trial court was not in error in

If the plaintiff is a foreign corporation engaged in business in another state, and has neither is or will not deliver its goods to purchasers in this state, through salesmen, and without having any office or place of business here, it is engaged in interstate commerce and is not subject to the requirement of qualifying itself to do business in this state as a foreign corporation before suing and also or identifying any action in our courts. Lehigh Tanning Co. v. Hilmer, 265 Ill. 396.

In an attempt from the allegations of the complaint, included in the motion, that an antecedent duty exists at the time, for no allegation that the plaintiff was engaged in being domestic business in Illinois * * without a license as a foreign corporation, in ", and such the rulings of this court in the interstate commerce but the case was a local transaction commenced which within the state of Illinois. In the opinion these allegations are not sufficient to support the plaintiff's motion or petition to vacate the judgment. They are merely conclusions of the pleadings. To make out a proper petition it should allege facts sufficient to show that the plaintiff was a foreign corporation and that the transaction, said sues, involved being business in this state within the meaning of the statute. The petition sets forth no such facts.

It might have been contended if the plaintiff had taken such action as would have amounted to a dismissal of the petition, by moving to strike it for insufficiency, for we think the plaintiff's objections to the defendants motion for order vacating the judgment, in complaint not the issue of the petition, as amounting, in effect, to a demurrer to the petition or a motion to strike it.

In our opinion, the trial court was not in error in

holding the petition to be insufficient, and in denying the defendant's motion to vacate the judgment.

We find no error in the record and therefore the judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

329 - 27805

Opinion filed June 20, 1923.

N. SIMON, et al,
Appellees,

v.

CORNELIUS T. ALLEN,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

By this appeal the defendant Allen seeks to reverse a judgment for possession, recovered in the Municipal Court of Chicago by the plaintiffs, in an action of forcible entry and detainer. The defendant went into possession of the premises in question under a written lease, covering a period beginning October 1, 1919, and ending September 30, 1920, the lease providing that the term was to continue from year to year after the last mentioned date until the lease should be terminated at the end of the first or any subsequent year, by either party giving to the other not less than sixty days previous notice, in writing, of such termination.

On or about July 13, 1921, a notice in writing was served upon the defendant, in person, by one Segall, acting for the plaintiffs. This notice was dated July 9, 1921, and it advised the defendant that his tenancy of the premises in question would terminate on September 30, 1921, and by the notice the defendant was requested to surrender possession of the premises on that date. Subscribed to this notice appeared the names of the two plaintiffs. The defendant refusing to surrender possession on

September 30, 1921, the plaintiffs instituted these proceedings in forcible entry and detainer.

The defense interposed by the defendant, at the trial in the Municipal Court, was to the effect that the two signatures appended to the notice, were in the same hand writing and that apparently one or both of the signatures was signed by some person purporting to act as an agent and that inasmuch as the notice was not given to the defendant personally, by the plaintiffs or one of them and as the notice itself did not show or establish the authority of any agent to sign for either or both of the plaintiffs, it was not sufficient to terminate the lease. This contention is, of course, without merit. The evidence in the record establishes the fact that the notice served on the defendant was prepared by one Fein, a lawyer representing the plaintiffs. Each of the plaintiffs testified that they were present when their names were signed to the notice by Fein and they each testified that they authorized him to sign their names. Such a notice as is contemplated by the lease involved here need not be signed by the landlord personally but may be signed by a duly qualified and authorized agent and if it is signed by a duly qualified and authorized agent, acting in behalf of the landlord, it is not necessary that the notice itself disclose upon its face, either the fact of the agency of its extent.

There being no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

September 30, 1933, the plaintiffs instituted these proceedings in juvenile court and obtained.

The defense interposed by the defendant, at the trial in the municipal court, was to the effect that the was signature appended to the notice, were in the same handwriting and that apparently one or both of the signatures was signed by some person purporting to act on an agent and that inasmuch as the notice was not given to the defendant personally, by the plaintiffs or one of them and as the notice itself did not show or establish the authority of any agent to sign for either or both of the plaintiffs, it was not sufficient to invoke the issue. This contention is, of course, without merit. The evidence in the record establishes the fact that the notice served on the defendant was prepared by one John, a lawyer representing the plaintiffs. Each of the plaintiffs testified that they were present when John came and signed in the matter of his act for them. Each of the plaintiffs testified that they were present when John came and signed in the matter of his act for them and authorized him to sign their names. Such a notice as is contemplated by the laws involved here need not be signed by the individual personally but may be signed by a duly qualified and authorized agent and if it is signed by a duly qualified and authorized agent, acting in behalf of the landlord, it is not necessary that the notice itself disclose on its face, either the fact of the agency or its extent.

There being no error in the record, the judgment of the municipal court is affirmed.

AFFIRMED.

Walter Ada Cummings, JJ. concur.

399 - 28234

Opinion filed June 20, 1923.

JOHN J. RYAN, Appellee, v. CHARLES E. FRAZIER, et al, as CIVIL SERVICE COMMISSIONERS, Appellants.	APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE THOMSON delivered the opinion of the court.

John J. Ryan filed a petition for a writ of certiorari in the Circuit Court of Cook County, directed against the Civil Service Commissioners of Chicago and the Secretary of the Commission, commanding them to certify to the court the proceedings had before the Commission, involving his discharge as a Civil Service employee. The defendants filed their return to the writ. The petitioner made his motion to quash the return of the defendants and the latter made their motion to quash the writ of certiorari and dismiss the petition, and after a hearing on these respective motions, the Circuit Court sustained the motion of the petitioner to quash the return of the writ and denied the motion of the defendants to quash the writ of certiorari and dismiss the petition. To reverse these rulings, the defendants have perfected this appeal.

The record discloses that the petitioner was working for the City in its classified service, as a captain of police; that charges were filed against him before the defendants, constituting the Civil Service Commission and that he was suspended, and that after a hearing before the commission he was discharged. The contention of the petitioner is that the finding ofthe Commissioners

ROOT J. DISM.

Appellee,

v.

CHARLES W. MALTZER, et al.,
as City Commissioners,

Appellants.

Appeal from
Circuit Court
of Cook County.

Honorable Jno. G. Gemmill,
Judge presiding.

Mr. Justice Crane delivered the opinion
of the court.

This is also like a petition for a writ of mandamus in the Circuit Court of Cook County, to compel Charles W. Maltzer Commissioner of Charges and the Department of the Comptroller, commonly know as weights of the South Side Pumping Station, including the installation, furnishing the plumbing in a first class service manner. The defendants filed their answer to the writ. The petitioner made an motion to quash the answer on the ground that the defendants had the further more their power to quash the writ of mandamus and the further more their power to quash the writ of mandamus and dismiss the petition, and after a hearing on these respective motions, the Circuit Court sustained the motion of the petitioner to quash the return of the writ and denied the motion of the defendants to quash the writ of mandamus and dismiss the petition. To reverse these rulings, the defendants have perfected this appeal.

The record discloses that the petitioner was working for the City in the electrical service, as a repairman of pulleys; that charges were filed against him before the Commission, accusing him with drinking liquor and that he was suspended, and that after a hearing before the Commission he was discharged. The contention of the petitioner is that the Trading office Commissioner

against him, as shown by the record, is insufficient. That finding is as follows: "Upon investigation of within charges we find that a notice stating the time when and the place where this investigation was to be held, together with a copy of the charges herein, was duly served on the said John J. Ryan in person, more than five days prior to this investigation; and the said John J. Ryan appeared in person and was represented by counsel; whereupon the witnesses were sworn and their evidence was heard by the Commission. And we further find from the evidence that the said John J. Ryan is guilty as charged in the within and foregoing charges, and order that he be discharged from the Police Department and from the service of the City of Chicago."

In support of the orders and judgment of the Circuit Court, the petitioner contends that the finding of the Civil Service Commission removing him from his position as captain of police, stated no evidence nor did it state any facts justifying his removal, the only finding being that he was guilty, "as charged in the within and foregoing charges." In recent opinions handed down by this court in Onions v. Coffin, et al, Gen. No. 27553; and in Cord v. Coffin, et al, 226 Ill. App. 288, we held that similar findings were insufficient, basing our decisions on thedecision of the Supreme Court in Funkhauser v. Coffin, etal, 301 Ill. 257. All that was said in the opinions handed down in the cases referred to is applicable to the situation presented in the case at bar. For the reasons stated in those opinions we hold that therewas no error in the orders and judgment of the Circuit Court of Cook County, from which the defendants have appealed, and therefore the judgment of the Circuit Court is affirmed.

JUDGMENT AFFIRMED.

TAYLOR AND O'CONNOR, JJ. CONCUR.

against him, as shown by the record, is sufficient. That finding is as follows: "Upon investigation of which charges we find that a notice stating the time when and the place where, a hearing was to be held, together with a copy of the charges herein, was duly served on the said John C. Dunn in person, more than five days prior to this investigation and the said John C. Dunn appeared in person and was represented by counsel; wherefore the attorneys were permitted and duly entered their appearance in the investigation. And we further find from the evidence that the said John C. Dunn is guilty as charged in the within and foregoing charges, and order that he be discharged from the police department and from the service of the City of Chicago."

In spite of the orders and judgment of the Circuit Court, the petitioner retained that position and the City Service Commission investing him from his position as captain of police, stated no evidence nor did it state any facts justifying the removal, the only finding being that he "guilty, for reasons in the within and foregoing charges." In recent litigation based upon by this court in Dunne v. Dalton, et al., Sup. Ct. 47933; and in Dunn v. Dalton, et al., 4th D.C. App. Ct., we held that police Captains were Department heads, having the discretion on investigation of the superior Court in Lundquist v. Dalton, et al., 301 Ill. 197. All that we said in the relator's behalf upon the cause referred to is applicable to the situation presented in the case at bar. Our ruling stated in those opinions we hold that discretion as after in the review and judgment of the Circuit Court of Cook County, from which the decisions have appealed, and therefore the judgment of the Circuit Court is affirmed.

Affirmed.

Mulroy and O'Connor, JJ., concur.

202 - 27678

Opinion filed June 20, 1923.

HULDA HENSEL,

Appellee,

v.

METROPOLITAN WEST SIDE ELEVATED RAILWAY COMPANY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages for personal injuries sustained by her in a collision of trains which occurred April 27, 1915. To the declaration the defendant filed the general issue, and to relieve itself from liability introduced in evidence a written release under seal executed by the plaintiff about one hour and 20 minutes after the accident. There was a trial before a judge and a jury and a verdict was rendered in favor of the plaintiff for $12,500.00, from which plaintiff remitted the sum of $135.00, being the sum she had received from the defendant at the time she executed the release. Judgment was entered on the verdict for the balance, $12,365.00.

Plaintiff sought to avoid the release on the ground that at the time of its execution she was in such physical and mental condition that she did not know that she was executing a release, and that the defendant in procuring her to execute it took such an advantage of her as would amount to fraud. The jury found in plaintiff's favor and the defendant contends that such finding is against the manifest weight of the evidence.

It has long been the settled law of this state that it is the duty of this court to weigh the evidence and if upon examination, we find the verdict of the jury to be against the manifest weight of the evidence, to reverse the judgment. Donelson v. S. St. L. Ry. Co., 235 Ill. 625.

The record discloses that on the morning in question plaintiff boarded one of defendant's trains for the purpose of going to her place of employment downtown; that there was a collision between two of the elevated trains, in which plaintiff was injured; that she was taken from the place where she was injured to her home and shortly thereafter was attended by her physician, Dr. Miller. He examined her and gave such attention and treatment as he thought she required and then left. Shortly afterwards John J. Moran, an adjuster for the defendant, and Dr. Chase called to see plaintiff at defendant's request. Plaintiff was rooming with a Mrs. Goodman who admitted Dr. Chase and Moran to plaintiff's room. They informed plaintiff that they had been sent there by defendant to see if they could be of any service or assistance to her and stated that Dr. Chase wished to examine her for this purpose. There was some contention that plaintiff would not permit the examination without the presence of her own physician, Dr. Miller, and thereupon Moran went to the telephone and called Dr. Miller, who returned shortly. Moran then left the room and Dr. Chase made an examination of the plaintiff in the presence of Dr. Miller. When this was concluded Moran returned to the room and prepared a release in the usual form for plaintiff to execute. The release was executed in duplicate and witnessed by Drs. Miller and Chase and also by Moran. The consideration stated in the release was $135.00, which they paid or left with the plaintiff, $50.00 of which was paid to Dr. Miller

for the services he had rendered and which it was assumed would be thereafter required of him in the treatment of plaintiff, it being estimated that plaintiff would be laid up for from one to three weeks. Thereupon the three parties left, Doran taking the release. Dr. Miller continued to treat plaintiff for about five weeks and she seemed not to improve. Being dissatisfied she dispensed with his services and engaged Dr. Schaubel. He made an examination and found the left shoulder bruised; that plaintiff complained of pain in her back and there was some discoloration there and also in the left leg. He also found that plaintiff was highly nervous, anaemic, and complained of considerable pain. He testified that he also found upon examination "a mass on the crest of the ilium, or down in the pelvis, which proved to be the left kidney." He had other doctors assist him in diagnosing and prognosing the case, one of the doctors being from the elevated railroad company, and it was discovered that plaintiff had a loose kidney. She was operated upon and remained in the hospital six or eight weeks. The doctor continued to treat her for two years. She then went to Milwaukee to live with her sister where she underwent another operation, and at the time of the trial, October, 1921, more than six years after the accident, she was still in a very bad state of health and was confined to her bed a great part of the time.

On December 6, 1915, about six months after the accident, plaintiff filed a bill in chancery in the Superior Court of Cook County seeking to set aside the release on the ground that it had been procured from her by fraud and circumvention. After issue joined apparently there was a hearing and the bill was dismissed on the ground that plaintiff had an adequate remedy at law.

The law is that if there was fraud in obtaining the

for the surgeon he had tendered his notice. It was assumed would be unnecessary required of him in the treatment of Minnie?", is being outlinded that physicist would be held up for from one to three weeks. Concerning the three months left, before being the patient, Dr. Miller mentioned he would endeavor for which five weeks and the second was to improve. Being dismissing one discussed with his services and engaged Dr. Stanford. He with an examination and found the left ulcerated breast; that physicist complained of pain in her back and thinks was some fluctuation in her and that in the left leg. He also found very physicist was mildly feverish, nervous, and complained of headaches pain. He instructed that he also found some medication to ease an area of the right, or down in the pelvis, which proved to be the left kidney.? He had other serious results his in diagnosing and prescribing the most, one of the doctors being from the eleventh medical company, and it was discovered that physicist had a fever rather. He was operated upon and remained in the hospital six months weeks. The doctor anticipated in view that for the years. He also was an influence in live with her sister where she underwent various operation, and at the time of the trial, October, 1917, were from six years after the accident. She was still in a very bad state of health and was confined to her bed a great part of the time.

On January 8, 1918, about six months after the acci-dent, physicist filed a suit in chancery in the Superior Court of Cook County, Illinois, to set aside the release on the ground that it had been procured from her by fraud and misrepresentation. After issue joined, evidence was a hearing and the suit was dismissed on the ground that physicist had an accurate remedy at law.

The law is that if there has fraud in obtaining the

execution of the release, it may be voided in a court of law, but where the fraud consists of misrepresentation as to collateral matters or as to the nature and value of the consideration for the release, resort must be had to equity. Fapke v. Hammond Co., 192 Ill. 631; Chicago City Ry. Co. v. Uhter, 212 Ill. 174.

In contending that the verdict is against the manifest weight of the evidence, counsel for the defendant in their brief state: "The chief issue in this case was whether the action was barred by the release, whether the release was executed by the plaintiff while in possession of her mental faculties, with knowledge of its contents and import, in other words under circumstances which may be binding upon her." And they contend that the overwhelming weight of the evidence shows that when plaintiff executed the release she knew its contents and import. It, therefore, becomes necessary for us to consider in some detail the evidence on this proposition.

Plaintiff was an unmarried woman about thirty-eight years old. She was employed as a seamstress at Marshall Field & Company and had worked there for a number of years prior to the date she was injured. She testified that she was on her way downtown on the morning of the accident seated in the rear seat of the last car of the train; that at the time of the collision something heavy struck her on the shoulder, arm and back and knocked her over; that the next thing she remembered she was on the platform of the station "feeling very sick", and that the next thing after that that she knew she was at home, downstairs in a chair, and later upstairs in her room; that her physician, Dr. Miller, was present, she saw him come in; that she was feeling very sick in her head and felt like fainting; that she could not walk; that

consideration of the evidence, it has, in point of fact, been held that the fixed constants of contemporaneous or subsequent mistakes or as to the nature and value of the consideration for the release, cannot not be had in equity. Jones v. Thomas Cole and Co., 2nd Ch. 481; Gordon v. Gordon, 3rd Ch. 1.

In considering that the verdict in favour the defendant Mainwaring of the evidence, counsel for the defendant in their brief state: "The case came to this when the evidence of Julia was barred by the release, whether the defendant was entitled to plaintiff while in possession of her legal faculties, with knowledge of the contents and import, in which case such circumstances which may be binding upon her." And also contend that the overwhelming weight of the evidence shows that when plaintiff executed the release she knew the contents and import. It, therefore, becomes necessary for us to consider in more detail the evidence on this proposition.

Plaintiff was an American woman about thirty-eight years old. She was widowed or a spinster at Portland Ind. a township and had worked there for a number of years prior to the date she was injured. The testimony that she was on her way home on the morning of the accident occurred in the year 1924 at the last car of the train that on the time of the collision something heavy struck her on the shoulder, she and head and knocked her over; that the next thing she remembered she was on the platform of the station "feeling very sick", and that the next thing after that that she knew she was at home, downstairs in a chair, and knew nothing in her mind; that her physician, Dr. Gilder, was present, she saw him once in that she was feeling very sick in her head and felt like fainting; that she could not walk; that

she felt as though she could not move at all; that she was suffering great pain all over her body; that Dr. Miller only felt her shoulder and did nothing else; that right after Dr. Miller left she was sitting in a chair and two men came in; that one of them said: "I am a Doctor", and one said "Who is your Doctor?" that "I said 'I don't know'"; that she could not remember the name of her doctor any more; that one of the men took a card from the dresser and went out and came back with Dr. Miller; that at that time "I was sick"; that "I couldn't quite sit any more in my chair, always was falling"; that she had a headache and "everything was walking in the room, all around, just as if I was always dizzy in my head"; that Dr. Miller said that one of the men was a doctor and that the doctor then felt her shoulder, and did nothing else; that the two doctors went out into the hall and then came back again; that one man put a paper on a chair and said: "Write your name" and gave her a pencil, and then he put another paper on the chair and said: "Write your name." She further testified that she thought she wrote her name as he told her; that then the man counted out some money and laid some bills in her lap and said: "$50.00 - give that to your Doctor"; that then he counted out some more bills and said "$85.00", and then they all went out; that the papers which she signed were not read to her, only laid onthe table; that she did not know what they contained or why they left the money for her; that all the time they were there she was very sick; "I always wanted to fall, I was dizzy. Everything in the room felt like walking"; that she threw the money on the floor; that her arm and shoulder and back, just above the hips, pained her; that Dr. Miller treated her for a few weeks thereafter but that she got no better; that he told her there was nothing wrong with her; that she then changed doctors. She further testified that in 1911, about four years before the accident, Dr.

she felt as though she could not move at all; but the muffled
dog gave pain all over her body; that Dr. Miller only felt her
shoulder and did nothing else; that night after Dr. Miller left
she was sitting in a chair and had been there for; that one of them
said: "I am a Christ", and one said "You is your Christ" that
"said I don't know"; that she could not remember the name of
her doctor any more; that she of the day had a card from the
dressmaker and went out and came back with Dr. Miller; that at that
time "I was dizzy"; that "I guess" inside all was there in my
chair, always as Christ; that the day a remedy and "everything
was walking in the room, all around, just as if I was always sitting
in my bed"; that Dr. Miller said that one of the men was a doctor
and that the person then felt her shoulder, and did nothing else;
that the two doctors went out into the hall and then came back
again; that one man put a paper on a chair and said: "Write your
name" and gave her a pencil, and then he put another paper on the
chair and said: "Write your name." The further testimony that
she thought she wrote her name as he said her; that then the
man counted one, one, one, and then said "Write in her lap and
said: "Write like as your name"; that then he counted
out some more bills and said "$20.00", and then that all went out;
that the person which she signed was not read to her, only said
only bills; that she did not know what they contained or why
they left the money for her; that all the time they were there
she was only sick; "I always wanted to fall." I was down. Stand-
ing in the room THIS SIDE WALKING; that she other the money on
the floor; that her the one crumpled and hard, just where the
hole, pointed out; that Dr. Miller arrived her for a few weeks later
after that when she got to Detroit; that he talk her where she was
long wrong with her; that she then changed doctors. The testimony
verified that in 1911, about four years before the indictment.

Miller operated on her and removed her appendix and left ovary. She was laid up at that time about eight weeks. The doctor had treated her for sometime before the operation. Except for this period of time and her regular vacations she had worked steadily for Marshall Field & Company for a number of years and that nothing was wrong with her health. On cross-examination she testified that at the time of the accident something struck her on the head and made a hole which bled. Plaintiff further testified that on August 11, 1915, Moran the adjuster again called on her and that she signed a statement at that time which was presented to her by Moran. She denied that any other person from the defendant company called on her after Moran and the doctors left; that the first time she knew that anyone claimed she had settled with defendant was about two months after the accident when Moran called with her physician, Dr. Schaubel, and she asked Moran if he was the same man who had her sign the papers on the day she was injured; that Moran replied that she should not blame everything on him because it was just as much Dr. Miller's fault as it was his that they made her sign the papers. Then they discussed how much time she had lost and the expense she was put to on account of the injuries, and Moran wrote a statement purporting to state the nature of her injuries and the expense incurred, which statement he had her sign in the presence of Dr. Schaubel, but which the latter did not sign as a witness.

For the defendant Moran testified that he was an adjuster in the employ of the defendant; that he heard of the accident and went with Dr. Chase to plaintiff's home; that he informed the lady of the house that he was from the railroad company and wished to see plaintiff; that he was shown to plain-

tiff's room, which was on the second floor; that plaintiff was lying in bed; that he told her he was there representing the railroad company with a doctor and wanted to see what they could do for her; that she stated she was under the care of Dr. Miller and did not care to have another doctor see her unless Dr. Miller was there; that her conversation was perfectly rational; that he asked her where he could find Dr. Miller and she stated that she did not know; that he then went to the telephone downstairs and telephoned to Dr. Miller and asked him to come over, which Dr. Miller did shortly thereafter; that he informed Dr. Miller that he wanted permission for Dr. Chase to examine plaintiff; that the permission was granted and the witness left the room; that he returned after the examination, which took about fifteen minutes; that the two doctors told him the conditions they found; that plaintiff was complaining of pain in her shoulder but there was no visible injury; that under normal conditions the doctors thought plaintiff's recovery would be prompt; that plaintiff inquired of the doctors how long they thought she would be laid up and that Dr. Miller said two or three weeks; that the witness then asked plaintiff what she thought she ought to receive from the company, and that she said she was a dressmaker working in a department store for $15.00 a week; that he asked her what she thought the company should do for her, and that she said she was injured through no fault of her own and did not think that she ought to stand any expense in connection with the matter, and that she said she would settle it that way; that the expense was then estimated at $135.00; that he first figured the expense at $110.00, and that plaintiff then said she thought she ought to have something for pain and suffering; that he replied there was no way of placing any monetary value on pain and suffering;

[illegible] man, which was on its seventh floor that plaintiff was lying in bed; that he did not be see there representing the defendant company with a [illegible] and wanted to see what they would do for her; that she stated she was under the care of Dr. Miller and [illegible] to have [illegible] Dr. Miller; that she stated that she was above; that her conversation had partially quieted; that he [illegible] behind her where he could find Dr. Miller; and she stated that she did not know; that he then went to the telephone connection and telephoned to Dr. Miller and asked him to come over, which Dr. Miller did shortly thereafter; that he returned the office and the [illegible] he [illegible] plaintiff; that he wanted permission for Dr. Chase to examine plaintiff; that the permission was granted and the witness left the room; that he returned after the examination, with the [illegible] stated; that was the doctors said his conclusions they found that plaintiff was complaining of pain in her stomach but there was no visible injury; that under normal conditions the doctors thought plaintiff's recovery would be speedy; that plaintiff impaired of the condition her long stay [illegible] was going to take up and that Dr. Miller made two or three[illegible] that the [illegible] then asked plaintiff what she thought she ought to receive from the company, and that she said she was a dressmaker working in a department store for $18.00 a week; that he asked her what she thought the company should do for her, and that she said she [illegible] through to think of her now and did not think that she ought to ask for anything; [illegible] and that the most the company could do; that the company was then estimated at $[illegible]; that he first figured the expense at $10.00, and then plaintiff then said she thought she ought to have something for pain and suffering; that he replied that he [illegible] of injury or complaint [illegible]

that he then added $25.00 to the $110.00, which she said she would accept; that he then made out a release in duplicate and handed one copy to the plaintiff and told her that he would read over the other and asked her to follow him; that she took the paper and said she could not read without her glasses; that the glasses were on the dresser, that he handed them to her, and then read the release slowly until he came to the figures; that he then totaled the figures to see what they amounted to; that she signed the release in duplicate and that they were witnessed by the two doctors and himself. On cross-examination he said they estimated that Dr. Miller would be required to call on plaintiff ten or fifteen times before she would entirely recover and that this was the way they arrived at the sum of $50.00 for the doctor.

Dr. Chase testified that he had been rendering professional services to the defendant company for seven or eight years; that he went with Horan to the plaintiff's home on the day in question and that they were shown by the landlady to plaintiff's room; that plaintiff was in bed; that Horan explained that Dr. Chase was sent to render such aid as might be necessary; that plaintiff said she had already been attended by her own physician and would not permit another examination unless he were present; that she appeared to be rational; that Horan went downstairs and called up Dr. Miller whose name plaintiff had given him; that Dr. Miller came and that the witness went over the case with him and then made an examination of plaintiff in Dr. Miller's presence; that plaintiff complained of pain and soreness in the left shoulder; that he examined these parts and found no mark of injury; that the shoulder seemed to be sore; "she complained of extreme nervousness and said she felt faint

that he then added $25.00 to the $110.00, which she said she would accept; that he then made out a release to Phillips and handed one copy to the plaintiff and told her that he would read over the other and asked her to follow him; then she took the paper and said she could not read without her glasses; that the glasses were on the dresser, that he handed them to her, and then read the release slowly until he came to the figures; that he then helped the figures to see what they meant to; that she signed the release in question as her last act was witnessed by the two doctors and himself. On cross-examination he said they estimated that Dr. Miller would be required to call as plaintiff ten or fifteen times before she would definitely recover and that this was the way they arrived at the sum of $25.00 for the dresser.

Dr. Chase testified that he had been conducting professional services to the defendant company for seven or eight years; that he went with Miss to the plaintiff's home on the day in question and that they were given by the housemaid to plaintiff's room; that plaintiff was in bed; that Miss mentioned that Dr. Chase was sent to render such aid as might be necessary; that plaintiff said she had already been examined by her own physician and would not permit another examination unless he were present; that she appeared to be relieved; that Miss then demonstrate and called up Dr. Miller where upon plaintiff had given him; that Dr. Miller came and that the witness was over the case with him and then made an examination of plaintiff in Dr. Miller's presence; that plaintiff complained of pain and soreness in the left abdomen; that he examined those parts and found no mark of injury; that the complaint seemed to be nervous "the complaining of extreme nervousness and relief left right

as we examined her;" that she said she had fainted at the time of the accident; that after examining her he talked with Dr. Miller and told Moran what he had found; that there was talk of settlement; that they thought plaintiff had a severely bruised shoulder, and they estimated she would be laid up about three weeks; that Moran asked her what she thought she ought to have by way of settlement, and that it was estimated that Dr. Miller's charge would be about $50.00; that the releases were then made out and that Moran read one aloud and plaintiff followed by looking at the other; that they were then executed and witnessed by Moran and the two doctors; that she appeared to be sane and to know what she was doing all the time he was there. He further testified: "She surely was nervous at that time. She appeared to me like one you call neuretic, or one who was suffering from nerves." On cross-examination he testified: "I developed that she was awfully nervous on examination * * * There are some persons who are nervous and it might effect their mentality."

Dr. Miller testified that he knew plaintiff since 1911; that shortly after the accident someone called him and he went to see plaintiff where she lived; that the landlady, Mrs. Goodman, met him at the door and showed him to plaintiff's room upstairs; that she was conscious and did not appear to be dazed; that she told him she had been in an accident on the elevated railroad and explained that she suffered a severe blow on the shoulder at the time; that he made an examination and found subjective symptoms only; that she complained of pain in the left arm; that "she was very highly excited and told an incoherent story of the accident. That was all."; that he exam-

ined her head and found no cuts or bruises, and was there probably half an hour; that he left and went home and was shortly thereafter called by Moran; that he then returned to plaintiff's room and met Moran and Dr. Chase; that he told her it was customary for a person injured in an accident to be examined by a physician for the railroad company, and that she thereupon consented and Dr. Chase made an examination in his presence; that Moran then talked about a settlement to plaintiff and the amount of the witness's bill was discussed and estimated at $50.00; that Moran paid her $135.00 and she handed the witness $50.00; that she appeared perfectly rational and seemed to understand what she was doing at the time she signed the releases; that he continued to treat her for a few weeks and then was discharged by her. On cross-examination he testified: "I found Miss Hensel highly nervous and excited there at that time."

Dr. Strauss testified that shortly after the accident he was requested by defendant to call with another adjuster named Rapp to see plaintiff, which he did; that the landlady showed them up to plaintiff's room and that he introduced himself as being sent by the railroad company to examine her to see what could be done for her; that plaintiff was sitting in a rocking chair with her arm in a sling; that when he asked to examine her she stated that another doctor had been there from the company, and that he made an examination and that she had made a settlement; that the witness thereupon left. The defendant was unable to produce Rapp at the trial.

Mrs. Goodman, the landlady, testified that on the morning in question she helped plaintiff up to her room; that Dr. Miller called, and that after he left Moran and Dr. Chase called; that Moran then called Dr. Miller on the telephone

land but could not from me sure as certain, neither there probably built on hour; that he left and were home and our doctor by another called by horse; that he then returned to plaintiff's room and met Drs. Stone; that he said he did it was necessary for a person injured in an accident to be examined by a physician for the railroad company, and that the examination was made and Dr. Stone made an examination in his presence; that Dr. Stone taken about a measurement of plaintiff and the count of the witness's hall was discovered and measured as 6ft.4in; that Dr. Stone paid her $15.00 and the bonder the witness $10.00; that she appeared perfectly rational and recent to understand what she was doing at the time she signed the release; that he continued to work for for a few weeks and then her discharged by Dr. On cross-examination he testified: "I found her learned highly nervous and excited there at that time."

Dr. Stone testified that verbally that the examination he was requested by defendant to call with another physician named Hopp to see plaintiff, which he did; that the landlady showed them up to plaintiff's room and that he introduced himself as being sent by the railroad company to examine her to see what ailed her; that plaintiff was sitting up in a rocking chair with her arm in a sling; that when he asked to examine her she stated that another doctor had been there from the company, and that he made an examination and that she had made a settlement; that the witness thereupon left. The defendant was unable to produce Hopp at the trial.

Drs. Gardner, the landlady, testified that on the morning in question she judged plaintiff up to her room; that Dr. Miller called, and that after he left Drs. Stone and Gardner called; that Dr. Stone then called Dr. Miller on the telephone

and that Dr. Miller returned and went to plaintiff's room; that two or three minutes after Moran and the doctors left the witness went upstairs to plaintiff's room and that plaintiff appeared to be "looney" and "funny"; that she did not appear to know her surroundings or what was going on. She further testified that afterwards on the same day another doctor and another claim agent called but that she did not permit them to see plaintiff.

Other evidence was introduced tending to show that plaintiff and some of the witnesses had given testimony before Judge Sullivan on the trial of the chancery case at variance with what they testified to in the instant case, but it would serve no useful purpose to discuss this further. The jury were specifically instructed at the request of the defendant that unless they believed from the evidence that plaintiff had shown by a preponderance of the evidence that at the time she executed and delivered the release she did not know, because of her physical condition, that she was executing and delivering a release, then the verdict should be for the defendant. The jury having found in favor of the plaintiff, must have found that she did not know she was executing a release at the time the release was signed and delivered. And upon a careful consideration of all the evidence we are unable to say that their finding is against the manifest weight of the evidence. In these circumstances, of course, the verdict should not be disturbed on the ground urged.

2. The defendant further contends that the court erred in refusing to direct a verdict in its favor because the evidence showed that plaintiff had ratified the release and settlement; that even if it be assumed that plaintiff did

and that Dr. Miller returned and went to plaintiff's room; that two or three minutes after noon and the evidence left the witness went upstairs to plaintiff's room and that plaintiff appeared to be "groggy" and "funny"; that she did not appear to know her surroundings or what was going on. The further testified that afternoons on the same day another doctor and another claim agent called but that she did not permit them to see plaintiff.

Other evidence was introduced tending to show that plaintiff and some of the witnesses had given testimony before Judge Sullivan on the trial of the chancery case of Tarlesse with what they testified to in the instant case, but it would serve no useful purpose to discuss this further. The jury were specifically instructed as the respect of the defendant that unless they believed from the evidence that plaintiff had shown by a preponderance of the evidence that at the time she consulted and delivered the release she did not know, because of her physical condition, that she was accepting and delivering a release, that the release should be for her benefit. The jury acting found in favor of the plaintiff, and have found that she did not know she was receiving a release at the time the release was signed and delivered. Upon a careful consideration of all the evidence we are unable to say that such finding is against the manifest weight of the evidence. In these circumstances, of course, the verdict should not be disturbed on the ground urged.

3. The defendant further contends that the court erred in refusing to grant a verdict in its favor because the evidence showed that plaintiff had ratified the release and settlement; that even if it be assumed that plaintiff did

not know she was executing a release at the time in question, yet the undisputed evidence shows that about three months afterwards when she realized that she had executed such a release she retained the money and has not yet offered to return it, and that in these circumstances it is the law that there being no actual fraud on the part of the defendant in procuring the release, the ratification of it by the plaintiff made it binding and effective.

The difficulty with this contention is that it seems to be an afterthought, the point having been first raised in this court. There is not a word in the record to indicate that on the trial the defendant made any contention that the release had been ratified by the plaintiff. On the contrary, the instructions given at the request of the defendant clearly show that there was no such contention made.

The point cannot be urged for the first time in this court and it was not saved by merely asking for a directed verdict. In each case cited by counsel for the defendant where the question of ratification was involved the point was clearly raised in the trial court by specific instructions or otherwise. Moreover, we think the contention made is unsound because it cannot be said as a matter of law that there was no fraud perpetrated on behalf of the defendant in obtaining the release. We think the most that can be said is that such question would be a proper one for the determination of the jury. The evidence of plaintiff and Mrs. Goodman tends to show that plaintiff was irrational and did not understand the nature and import of her conduct in executing and delivering the release. It was only about an hour and one-half after the accident that the release was presented to the plaintiff for her signature, and Dr. Miller

not know who was measuring a release or the time in question. per the undisputed evidence, does that about three months after were we realized that you had measured with a release the refunded the money and has not yet arrived to return it. and that is there circumstances it is you the time taken using as evidence fixed on the part of the defendant in presenting the release, the validation of it by the plaintiff was is lack- ing and effective.

The difficulty with this contention is that it seems to be an afterthought, the point having been first raised in this court. There is not a word in the record to indicate that on the trial the defendant made any contention that the release had been nullified by the plaintiff. On the contrary, the ex- pressions given at the request of the defendant clearly show that there was no such contention made.

The point cannot be upon for the first time in this court and it was not saved by merely asking for a directed ver- dict. In such case cited by counsel for the defendant where the question of modification was involved the point was clearly raised in the trial court by specific instructions or pleadings. However, we think the contention made is unsound because it cannot be said as a matter of law that there was no fraud perpetrated on behalf of the defendant in obtaining the release. We think the most that can be said is that such question would be a proper one for the determination of the jury. The evidence of plaintiff and one, Bowman tends to show that plaintiff was intoxicated and did not understand the nature and import of his consent in executing and delivering the release. It was only about an hour and one-half after the accident that the release was presented to the plaintiff for his signature, and Mr. Spiro

and Dr. Chase who were there at the time, both called by the defendant, testified that she was highly nervous and excitable. In these circumstances, of course, the question was not one of law for the court but one of fact to be submitted to the jury. Therefore, the motion for a directed verdict in defendant's favor was properly denied.

3. It is next argued that the court should have given instruction 3 requested by the defendant. By that instruction it was sought to tell the jury that they had no right to disregard the release in evidence "on the ground of any inadequacy of the consideration therein named, nor can the jury disregard the same because of any unfair conduct, if any there be, on the part of the defendant, or its agents, which relates solely to the consideration for which the release was given." We thigk the instruction was apt to be misleading. The jury might believe that they should not consider the inadequacy of the consideration mentioned in the release at all in passing onthe conduct of the defendant in procuring it. It has been held that inadequacy of consideration is a circumstance that the jury might consider in determining whether the release was understandingly executed. C.I.T. Co. v. Ludlow, 108 Ill. App. 357. We think there was no such error in the refusal of this instruction as would warrant a reversal of the judgment.

Defendant further contends that the judgment is excessive, (1) on the ground that plaintiff's ill health following the accident did not result from the injuries sustained, particularly her kidney trouble, and (2) even if all the ills which plaintiff is shown to have suffered since the accident are to be attributed to the injuries which she sustained. Dr. Timm, who treated plaintiff in Milwaukee and who operated on her for

and Dr. Jones was only there at the time, just called by the referee, instead they who was highly nervous and unstable. In these circumstances, of course, the question was not one of law for the court but one of fact to be submitted to the jury. Therefore, the motion for a directed verdict in defendant's favor was properly denied.

D. It is next argued that the court should have given instructions 6 requested by the defendant. By that instruction it was sought to call the jury's attention to the fact that no right to disregard the relied in evaluating the record of my impairment of the constitutional statutory model, nor had the jury disregard the same because of any unusual conduct, if any there be, on the part of the defendant, or its agents, which relates solely to the constitution for which the injury "and injury" of the instruction was set to be identified. The jury might believe that they should not consider the inadequacy of the constitution mentioned in the evidence at all in reaching either conduct of the defendant in producing it. If the court held that inadequacy of constitution is a circumstance that the jury might consider in determining whether the release was unreasonable, Pittsburgh Co. v. Smith, 108 Ind. 500, 497. We think there was no such error in the refusal of this instruction as would entitle a reversal of the judgment.

Defendant further contends that the judgment is erroneous, (1) on the ground that plaintiff's (2) being injured the accident did not result from the injuries sustained, particularly his kidney trouble, and (3) even if all the life which plaintiff is shown to have suffered since the accident are to be attributed to the injuries which the accident. Jones, the treated identity in filmerne and the opinion he not for

a loose kidney, testified in answer to a hypothetical question that in his opinion the condition of the kidney might be attributed to the accident. Dr. Schaubel testified that he treated plaintiff for a number of months and until she went to Milwaukee; that he called in two other doctors, one of them being from the defendant company, to assist him in diagnosing plaintiff's trouble, and that he discovered the loose kidney and performed an operation to correct this condition. We think the evidence was sufficient to warrant the jury in finding that plaintiff's injuries resulted from the accident. We are also clearly of the opinion that if all the ills which plaintiff has suffered since the accident, resulted from it, the damages were not at all excessive. Counsel for the defendant in their argument say that her loss of earnings up to the time of the trial would not exceed $4,000.00, and that her medical and surgical attendance including hospital bills were not to exceed $900.00, making a total of $4900.00. Even if this were undisputed, we think the verdict is not too large. Plaintiff appears to have been in fairly good health before the accident and except for the operation which she had in 1911 she had worked steadily for a number of years. Since that time she has been unable to do anything and has suffered severe pain. The trial occurred about six years after the accident, and at that time plaintiff was able to be out of bed but a small part of the time. In these circumstances it is clear that the judgment is not excessive. Posch v. Chicago Rys. Co., 221 Ill. App. 241, and cases there cited.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

Opinion filed June 20, 1923.

230 - 27706

THEO. NEUGEYER,

Appellee,

v.

HOTEL LA SALLE COMPANY,
a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the defendant to recover damages for personal injuries claimed to have been sustained by him by reason of being struck and injured by a taxicab belonging to defendant. There was a trial before a judge and a jury and a verdict for $5,000.00 in favor of the plaintiff. On Motion for a new trial the court required a remittitur of $1500.00, and thereupon judgment was entered in favor of plaintiff for $3500.00, to reverse which the defendant prosecutes this appeal.

The record discloses that on the afternoon of May 14, 1919, plaintiff was walking west across LaSalle Street on the north side of Jackson Boulevard; that there was a safety island in the center of La Salle street at the north edge of Jackson Boulevard; that as plaintiff was crossing the west half of La Salle street a taxicab belonging to defendant and operated by one of its servants struck and injured him. Since we have decided that there must be a new trial we refrain from discussing the evidence any more than is necessary for stating the reasons for our decision.

Opinion filed June 20, 1935.

1. The defendant contends that the verdict is against the manifest weight of the evidence in that it shows that plaintiff himself was negligent and consequently not entitled to recover. We have considered the evidence in the record and, as stated, since there must be a new trial we refrain from discussing it, but are of the opinion that we would not be warranted in disturbing the verdict on the ground that it is against the manifest weight of the evidence.

2. The defendant further contends that the judgment should be reversed on account of plaintiff's counsel unnecessarily bringing before the jury on cross-examination of witnesses and in his argument the fact that the suit was being defended by a liability insurance company and not by the nominal defendant, the Hotel LaSalle Company. We think this contention must be sustained. The defendant called Theodore L. Stein as a witness. He testified to the effect that about two weeks after plaintiff was injured he saw him in the office where the witness was employed. The purpose of the testimony was to show that plaintiff's injuries were not as severe as he contended they were. On cross-examination the witness stated that plaintiff came into the office concerning some pending suit. He was then asked what insurance company he worked for, and he replied, "The Interstate Casualty Company." The record then discloses that there was a consultation between court and counsel out of the hearing of the jury. The witness was then asked by counsel for plaintiff: "And did this gentleman over here, Mr. Maloney - he is employed by them also, is he? A. Yes sir. Counsel for defendant: I object. Counsel for plaintiff: (Q) Are not they assisting in the defense of the case?" An objection to this question was

made and court and counsel went into chambers, where counsel for plaintiff said that what he was trying to show was the interest of the witness on account of his employment for the purpose of effecting his credibility. Counsel also stated that if defendant would withdraw the witness and consent to striking out his testimony, no further allusion to this matter would be made. The suggestion was refused. Court and counsel then returned to the court room where upon interrogation by the court Stein stated that plaintiff called in reference to a suit pending for one of plaintiff's clients, plaintiff having engaged in the insurance business, but that it was not the suit on trial. Thereupon counsel for plaintiff asked: "Q. You know Mr. Maloney here, don't you? A. Yes sir. Q. You know Mr. ApMadoc, too, don't you? A. Yes sir. Q. You know Mr. Maloney is in charge of the Claim Department of that company that you are employed by, don't you? A. Yes sir." Objection to this was overruled. The cross-examination then proceeded: "Q. You know that your company is defending this case, don't you? A. I do." Objection to this was made and overruled. Further on in the examination counsel for plaintiff asked the witness: "Q. Now, Mr. Stein, at that time you knew he had a claim against a company insured by your company, didn't you?" Counsel for defendant: "I object. I don't object so much to the question. I object to the reference." The objection was overruled.

It further appears from the evidence that the accident took place but a short distance from a large office building known as the Insurance Exchange, and that immediately after plaintiff was injured he was taken by a crossing policeman for first aid to a doctor whose office was in that building. The policeman testified for the defendant, and on cross-examination he was asked: "Q. Now isn't it a practice, or haven't you re-

made out counts and received some jail sentences, which counsel for plaintiff said that such is the reason in spite of the laws of the whites or counsel of the defendant for the purpose of affecting his credibility. Counsel also stated that if defendant would strengthen the witness and thereby be affecting his credibility, he further stated to this jurors would be well. The negotiations was refused. Court was asked this question to the court room made upon interrogation by the court trial stated that plaintiff called in reference to a suit pending for one of plaintiff's clients, plaintiff having mentioned in the testimony witness, but that it was not the suit at bar. Thereupon counsel for plaintiff asked: "Q. Do you know Mr. Kelsey Jones, don't you? A. Yes sir. Q. Do you know Dr. Alfredo, Mr. Ma's, don't you? A. Yes sir. Q. Do you know Dr. Stanley in Mr. Jones of the State Department of this company that you are employed by, don't you? A. Yes sir." Objection to this was overruled. The cross-examination then proceeded: "Q. Do you know that your company is defending this case, right? A. I do." Objection to this was sustained and overruled. Plaintiff on in the examination asked the plaintiff about the attorney: "Q. Now, Mr. Smith, at that time you came to him a claim against a company insure ed by your company, didn't you?" Showing the witness. "Q. The line. I don't object so much to the question. I believe to the relevance." The objection was overruled.

It further appears from the evidence that the defendant took photo was a short distance from a large office building known as the Tennessee Building, and that immediately after the SIT was injured he was taken by a passing motorcycle for first aid to a drug store where office was in that building. The policeman testified for the defendant, and on cross-examination he was asked: "Q. Now isn't it a practice, or haven't you ex-

ceived presents around Christmas time and other times from these insurance companies? A. No sir, never. Q. You never get anything? A. Not from any insurance companies whatever. Q. Did you ever get anything from any of the doctors up there? A. No sir, nothing at all." Certain doctors testified on behalf of the defendant and in his argument to the jury counsel for plaintiff said: "On the question of these doctors who testified in this case, one of these men - did you notice how handy they are there to the scene of the accident, up in the Insurance Building, best possible place, right up in that building, and this policeman, another fellow I could not prevent from talking, does he ever have the slightest doubt where he is going to take that man? He takes him right up to the Insurance building, right up to this doctor, who represents all these insurance companies." And again: "These gentlemen, prominent doctors, downtown doctors, Insurance Exchange doctors, etc." In reference to a doctor who testified for the defendant, counsel stated: "He says the insurance company might have paid it(meaning the doctor's bill for treating plaintiff) I don't know, but you notice this is a witness for the insurance company." This argument was objected and excepted to. It was clearly improper and highly prejudicial and should not have been permitted. McCarthy v. Spring Valley Coal Co., 232 Ill. 473; Wiersema v. Lockwood & Strickland Co., 147 Ill. App. 33.

In the McCarthy case, which was a suit for personal injuries, it appeared that the attorney representing the defendant of record was counsel for a liability insurance company. In his argument counsel for plaintiff referred to Mr. Bayne, who was representing the defendant, as the attorney for the Aetna Insurance Company. The Supreme Court held that such reference was subject to criticism. It was there contended that the reference was unnecessa-

active promoting means building size and other items from some insurance company? A. No sir, never. Q. Do you never get anything? A. Get from any insurance company? Q. Did you ever get anything from any of the agents or adjusters? A. No sir, nothing at all." Counsel concerns themselves as much of the testimony and in his argument to the jury compared the plaintiff said: "Do the greatest of these dangers, the temptation in this case, one of these men - all you million dollar jury was going to the means of the evidence, on the insurance building, best possible place, right up in that building, not this policeman, another fellow I could not prevent from entering, have he ever have the airplane motor where he is going to take them away? Do know the right to the insurance building, right on the main gallery, who furnishes the same insurance company, and again: "These gentlemen, president, partner, gentlemen, insurance company building, who." In [illegible] is [illegible] responsible for the defendants, serious choice. "Do any of these other company agents have paid any money for evidence all for breaking plaintiff? I don't know, but you getting help in a fine case for the insurance company." This argument was objected and excepted to. It was clearly improper and highly prejudicial and should not have been permitted. Cumberlin v. Gulfport Ice Co., 127 Miss. 472; Clayton v. Lockwood & Greene Co., 147 Ill. App. 21.

In the Cumberlin case, which was a suit for personal injuries, it appeared that the attorney representing the defendant corporation was counsel for a liability insurance company. In the argument counsel for plaintiff referred to Mr. Brown, who was representing the defendant, as the attorney for the insurance company. The supreme court held that such behaviour was calculated to prejudice. It was there contended that such behaviour was calculated to

tional but the court thought the remark was strange and unfortunate, and said (p.480): "It is strange that with the name of the appellant in counsel's mouth the name of Mr. Bayne, who was then personally assisting in the trial as attorney for the appellant, should have associated itself in counsel's mind and speech with the name of the Aetna Insurance Company as attorney, instead of with the name of the appellant. The question and the circumstances are well adapted to intimate strongly to the jury that appellant was insured against liability for accidents of this character, and that the party who would have to respond for any judgment that might be rendered was the Aetna Insurance Company. Evidence of this character was not competent. The intimation may not have been true and it is unfortunate that the suggestion should have been inadvertently made. The only effect it could have would be to convey an improper impression to the jury." For this reason and another, the judgment was reversed.

At the trial of the Wiersema case the defendant called a doctor who testified to the extent of plaintiff's injuries. It appeared that at the time of the injury the doctor had been telephoned by the defendant to attend the plaintiff. On cross-examination counsel for plaintiff asked the witness if he did not have a working arrangement with the London Guaranty & Accident Company, and if his bills were not paid by that Company. Upon objection this was stricken out but it was held that the error was not cured and the judgment was reversed. It was there held, citing authorities, that it was error to prove that a personal injury case was in fact being defended by a liability insurance company, as this would in no way tend to sustain the issues. It was there said that nothing could be more prejudicial to the defendant in such a case than to let the jury know that if they ren-

dered a verdict in favor of the plaintiff and against the defendant, the latter would not have to pay it.

In the instant case counsel for plaintiff had the right to show, if he could, that the witness Stein was interested or biased for the purpose of effecting his credibility, and if this could not be done, except by mentioning Stein's employer, the liability insurance company by name, it would be proper to do so. But the fact that a defendant is named should never be mentioned unless it is absolutely necessary to do so. Stein might have been properly asked on cross-examination if he was not interested in the defense of the suit, and if he replied that he was, this would be all that could properly be brought out. But, if he replied in the negative, it might be necessary to show that the employer of the witness was vitally interested in the outcome of the case. The fact that a liability insurance company is defending a case should never be mentioned unless legitimate evidence cannot be brought to the attention of the jury in any other way. In the instant case we think counsel might easily have shown that Stein might be interested or biased in the outcome of the suit without referring to the name of the liability company or to the fact that a liability company was interested at all. It was certainly inexcusable for counsel to refer to Maloney who was in the court room and apparently assisting in the defense of the suit. It was also highly improper to refer repeatedly to the insurance company by referring to the insurance doctors who represented all the insurance companies. These matters were reiterated by counsel for plaintiff and were highly prejudicial to the defendant.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

found a verdict in favor of the defendant and against the defendant. The latter would not have to pay it.

In the instant case counsel for plaintiff in the right to state, if he could, that the defendant might be interested in bringing the question of affecting his credibility, but it also could not be done, insofar as embarrassing plaintiff's witnesses, the liability insurance company is some, it could be argued to be so. But the fact that this a factor in some cases should be considered unless it is absolutely necessary to do so. Juries might have been actually made to misunderstand if he was not interested in the outcome of the suit, and if the relative was the, this would be all that could properly be brought out. But, if he testified in the negative, it might be necessary in order that the employer of the witness was actually interested in the outcome of the suit. The fact that a liability insurance company is defending a suit should never be mentioned unless legitimate evidence cannot be brought to the attention of the jury in any other way. In the instant case we think counsel might easily have shown that there might be interested or biased in the outcome of the suit without referring to the fact of the liability company or to the fact that a liability company was interested at all. It was unnecessary in- excusable for counsel to refer to defendant who did in fact testify from put constantly emphasis in the defense of the suit. It was also highly improper to write repeatedly to the insurance company by referring to the insurance company's representatives and insurance company. These matters were intended to prejudice plaintiff and were highly prejudicial to the defendant.

The judgment of the trial court in favor of the defendant in the instant but the order granting for a new trial.

Affirmed in part.

Opinion filed June 20, 1923.

27718
340-27718

GEORGE B. PERRETAU,
Appellee,

-vs-

CHICAGO RAILWAYS COMPANY, CHICAGO CITY RAILWAY COMPANY, CALUMET & SOUTH CHICAGO RAILWAY COMPANY, and THE SOUTHERN STREET RAILWAY COMPANY,
Appellants.

Appeal from Superior Court, Cook County.

Certiorari denied

MR. JUSTICE O'CONNOR delivered the opinion of the court.

230 I.A. 661

Plaintiff brought suit against the defendants to recover damages for personal injuries claimed to have been sustained by him by reason of one of defendants' street cars striking a mail wagon which he was driving, throwing him to the pavement and injuring him. There was a verdict and judgment in plaintiff's favor for $6000.00, to reverse which the defendants prosecute this appeal.

The record discloses that plaintiff was about sixty years of age and had been employed in the mail service of the Government for about twenty-five years; that about six o'clock in the evening of May 7, 1918, he was delivering a wagon load of first class mail, which he had collected in the downtown district, to the post office. It was a one-horse wagon with a top and sides of wire netting. Plaintiff was driving north on the east side of Dearborn Street between Jackson Boulevard and Adams Street. It was necessary for him to turn his horse to the east and cross over two street car tracks belonging to defendants to deposit the mail in a chute on the west side of Dearborn Street about twelve feet north of Jackson. As he was crossing the east or southbound track his wagon

Opinion filed June 20, 1968.

was struck by a street car and he was thrown to the pavement and injured.

1. Defendants contend that there is no liability because the evidence shows that plaintiff was guilty of contributory negligence as a matter of law. In support of this it is argued that on plaintiff's own version of the case the evidence discloses that plaintiff, acting as a reasonable man, knew that the approaching street car would collide with his wagon unless its speed was slackened or the car stopped, and that in these circumstances the law bars a recovery, citing Chicago Union Traction Co. v. Jacobson, 217 Ill. 54, and other cases.

Dearborn Street runs north and south and is intersected at right angles by Jackson Boulevard and Adams Street. The distance from the south side of Adams Street to the north side of Jackson is 383 feet and 7 inches. Quincy Street, an east and west street between these two streets, extends east but not west of Dearborn Street. The south side of Quincy Street is 151 feet and 7 inches north of the north side of Jackson Boulevard. The east side of Dearborn Street between Quincy and Jackson is occupied by the Great Northern Hotel. On the west side of Dearborn Street between Jackson and Adams the Federal Building is located. On the sidewalk near the west curb of Dearborn Street are about sixteen mail chutes, eight of them being south of the Dearborn Street entrance of the Federal Building, which is about the center of the building, and a like number north of the entrance. These chutes are 36 by 35 inches and seven or eight feet high.

The first chute north of Jackson Boulevard, the one in which plaintiff was intending to unload his mail, was about twelve feet north of the north side of Jackson Boulevard. The chutes were about twelve feet apart. Plaintiff had been employed in the mail service about twenty-five years, the first six or seven of which he spent as a carrier and the balance of the time driving a wagon collecting mail in the downtown district and delivering it to the post office.

Plaintiff called eight occurrence witnesses and the defendants called five, and as is usual in such cases, the testimony of the witnesses varied as to the distance between the street car and plaintiff's wagon when it swung across the tracks. They also differed as to the exact place where the collision occurred, some placing it a little south of Quincy Street and others closer to Jackson. Plaintiff testified that he was driving north in Dearborn Street about 100 feet north of Jackson when the street car was just about crossing Adams Street; that he swung his horse to the west and then to the southwest intending to drive to the chute north of Jackson. Several witnesses testified that the car struck the rear end of one of the rear wheels of the wagon, some of them testifying that it struck the left rear wheel as the wagon was about over the southbound track. The motorman of the car testified that plaintiff swung his horse across the tracks about forty feet in front of the street car; that he applied the air and sand and endeavored to stop the car but was unable to avoid the collision; that the point of contact was about between the horse and wagon. Other witnesses testi-

fied to the effect that plaintiff swung his horse in front of the car at such a short distance that a collision was inevitable, and that the motorman stopped the car as soon as he could. The evidence also tends to show that plaintiff was driving his horse at a walk. Some of the witnesses for the defendant, however, testified that the horse had been trotting in making the turn. It is the defendants' position that plaintiff was negligent in attempting to cross the tracks so near the approaching car, and that he was further negligent in that he failed to urge his horse at a faster pace after he had gotten upon the tracks; that if he had sone so, the collision would not have taken place. We have carefully considered all the evidence in the record and think it would serve no useful purpose to analyze the testimony of the several witnesses in detail. We cannot say that under the circumstances disclosed by the evidence all reasonable minds would reach the conclusion that plaintiff was not in the exercise of ordinary care for his own safety, and, therefore, the question was a proper one for the jury. And we are also unable to say that thefinding of the jury that plaintiff was in the exercise of ordinary care for his own safety is against the manifest weight of the evidence. If plaintiff was about 100 feet north of Jackson when he started to cross the tracks, as he testified, then the street car would be about 293 feet north of him, and from this and other facts and circumstances the jury might well believe that plaintiff might reasonably expect to cross the tracks ahead of the street car. This was an exceptionally busy place where the mail wagons are continually crossing the street car tracks to the chutes on Dearborn Street. This fact was well known to the men operating street cars in that street. The street between

fled to the effect that plaintiff among his horses in front of the car at much a short distance that a collision was inevitable, and that the motorman stopped the car as soon as he could. The evidence also tends to show that plaintiff was driving his horse at a walk. One of the witnesses for the defendant, however, testified that the horse had been trotting in nearing the curb. It is the defendants' position that plaintiff was negligent in attempting to cross the tracks so near the approaching car, and that he was further negligent in that he failed to make his horse at a faster pace after he had gotten upon the tracks; that if he had done so, the collision would not have taken place. We have carefully considered all the evidence in the record and think it would serve no useful purpose to analyze the testimony of the several witnesses in detail. We cannot say that under the circumstances disclosed by the evidence all reasonable minds would reach the conclusion that plaintiff was not in the exercise of ordinary care for his own safety, and, therefore, the question was a proper one for the jury. And we are also unable to say that the finding of the jury that plaintiff was in the exercise of ordinary care for his own safety in against the manifest weight of the evidence. If plaintiff was about 100 feet north of Emerson when he started to cross the tracks, as he testified, then the street car would be about 325 feet north of him, and from this and other facts and circumstances the jury might well believe that plaintiff might reasonably expect to cross the tracks ahead of the street car. This was an exceptionally busy place where the mail wagons are continually crossing the street car tracks to the chutes on Dearborn Street. This fact was well known to the men operating street cars in that street. The street between

Adams and Jackson is exceptional in this respect and, therefore, it was the duty of defendants' employees to observe the traffic necessarily the street car tracks between the street intersections and keep their cars under proper control at all times. What might be negligence in a person driving across street car tracks between street intersections in some places might not be so regarded in a street such as the one in question. In these circumstances we think there was no error in the court's refusal to give instruction 6 tendered by the defendants. By that instruction it was sought to tell the jury that if plaintiff just before and at the time he started to cross the southbound track knew or would have known, acting as a reasonable man, that the wagon would be struck unless the car should be stopped or its speed slackened, and notwithstanding, he deliberately took his chances in crossing, he could not recover and the verdict should be for the defendants. Whether it is the law that under any or all circumstances it is negligence for a person to drive across street car tracks between street intersections knowing that his vehicle will be struck by an approaching street car unless the car is stopped or its speed slackened, we do not determine. But we think it clear that such an instruction was improper when taken in connection with the peculiar traffic conditions in Dearborn Street at this point.

2. During the trial it developed that plaintiff was receiving $65.25 a month compensation from the United States Government, being two-thirds of his salary, he having been unable to work except for a day or two since he

was injured to the time of the trial which took place about three and one-half years after the accident. Counsel contends that since plaintiff is receiving compensation under the Federal Act any judgment rendered in the instant case is for the benefit of the Government, and, therefore, no recovery could be had unless the declaration alleged the exercise of the care by the real plaintiff, the United States Government. On the trial it was agreed by counsel that either party might refer to such parts of the Federal Compensation Act as they desired. That Act provides for the payment of compensation to employes of the United States injured while in the performance of their duties. Section 26 of the Act provides that "If an injury or death for which compensation is payable under this Act is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor" the Federal Commission may require an assignment to it of the right to enforce such liability, or to share in any money received in satisfaction thereof, or it may require the beneficiary to prosecute an action for damages in his own name; that if such injured person refuses to make such assignment or to prosecute when requested, he shall forfeit all right to such compensation. That section also provides that if the Federal Commission shall realize on a claim assigned to it or a suit prosecuted by the injured person in his own name, it shall apply the net proceeds to reimbursing the "Employees' Compensation Fund" for payments therefofore made, and that the surplus shall be paid to the beneficiary or credited on future compensation payable for the same injury. Section 27 of the Act provides for cases in which death or injury,

for which compensation is payable under the Act, is caused under circumstances "creating a legal liability in some person other than the United States to pay damages" but in which the beneficiary instead of the Federal Commission receives the proceeds of suit or settlement, such beneficiary is required to refund to the United States the amount of compensation theretofore paid, or shall credit the money so received upon any compensation payable to such person. On the trial it was stipulated that the Government required the plaintiff to prosecute the instant case in his own name. In Support of defendants' contention the case of Hines, Director-General, etc. v. Dahn, 267 Fed. 105, same case affirmed on appeal as Dahn v. Davis, Agent, 43 Sup. Ct. Rep. 320, is cited. In that while the railroads were being operated by the Government plaintiff was injured. He was receiving compensation under the Federal Act and it was held that he could not sue the Government for the same injuries thereby having two claims against the same defendant for the same injury. There are some expressions in the opinion rendered by the Circuit Court of Appeals that would lend force to counsel's argument, but in the Supreme Court it was said that if there was any surplus after the Government had credited itself for any compensation paid and to be paid, it obviously belonged to the beneficiary. The court there said (p.321): "If the amount of recovery exceeds the payments made and to be made, obviously the beneficiary would be entitled to the excess." Moreover, we fail to understand how the defendants could take advantage of the point made. The fact that the United States is paying compensation should in no way relieve defendants if they were legally liable.

In these circumstances it was not necessary, as counsel for defendants contends, to show that the United States Government was in the exercise of ordinary care at the time plaintiff was injured.

3. It is earnestly insisted that the verdict is excessive and that the court erred in refusing instructions tendered by the defendants on the issue of damages. It seems to be conceded that if plaintiff's physical condition was due to the accident and the injuries there received, the verdict would not be excessive. But it is contended by defendants that plaintiff's physical condition was not occasioned by the injury but that it was brought about by a disease with which plaintiff had been suffering for years prior to the accident, and that the evidence shows that for a long period of time before the accident plaintiff was suffering from syphilitic degeneration and arterio-sclerosis; that the injury received by him on account of the collision was slight.

The evidence shows that when the street car struck the wagon plaintiff, who was sitting on the seat of the wagon which was five or six feet above of the level of the pavement which was of creosote blocks, was thrown from the wagon and his head struck the pavement; that he fell on his head and that he was somewhat dazed; that he was assisted into the post office by some man and placed in a chair; that he seemed to be dazed and that his head was dropped forward and sideways. He there received medical attention from a Government physician. He was then sent to the hospital where he remained for about twenty-four hours and then went home alone on a street car. He went

back to work the latter part of May or the first part of June and worked about three days but was unable to continue. A week or two later he went to work at the Twentieth Street Station of the Post Office and worked a part of a day but was compelled to discontinue. He has been unable to work since that time and apparently will never be able to work again. Prior to the accident he weighed between 180 and 200 pounds and worked steadily for years. The evidence tends to show that his health was good. Immediately after the accident he began to lose weight until he weighed but about 150 pounds, and this was his weight at the time of the trial, three and one-half years after the accident. The evidence further tends to show that plaintiff had been treated for a venereal disease when he was about twenty-two years old. The treatment extended over a period of about six months, and plaintiff on cross-examination admitted that he might have told the doctor who treated him after the accident that he had had syphilis. The only doctor who testified to plaintiff having been afflicted with syphilis was Dr. Cronton, called by defendants. He testified that he graduated from medical school about a month prior to the accident and that at the time of the accident he was an interne at the Marine Hospital to which plaintiff was taken immediately after he was injured; that the witness made an examination of plaintiff and found a small bruise on the shoulder and a slight contusion on the head; that plaintiff held his head somewhat downward and forward; that he had a marked enlargement of the heart, known as hypertrophy of the heart; that he showed signs of hardening of the arteries; that there was a leakage of the heart; that his diagnosis at that time was luetic degeneration, which is another

term for syphilis; that plaintiff gave him no history of any childhood diseases; that plaintiff stated he had never had gonorrhea but that he had a chancre 35 or 40 years ago, and the witness stated that this was the primary cause of syphilis; that there was a Wassermann test taken which showed 3 plus, which indicates syphilis; that a spinal fluid test was made and that this showed the same disease; that plaintiff stayed at the hospital about two days. On cross-examination he testified that at the time he made the examination he was an interne at the Marine Hospital and had just recently graduated from medical school; that he made a report of his examination and had seen it recently at the Marine Hospital; that he went there to look over the report at the request of Dr. Leeming for the defendants; that he saw his report, which was dated August 23, 1918; that on that date Dr. Emmons was the consulting neurologist at the hospital. The witness further testified that after going over this report all that it showed was traumatic neurosis, and that the witness had not mentioned that fact on his direct examination; that his diagnosis as shown by the report was traumatic neurosis; that this meant a nervous disease resulting from an injury, and that that was all he reported when he made his examination in August, 1918; that it takes about six or eight hours to make a Wassermann test; that a bacteriologist makes such tests and that he was a bacteriologist at that time; that he could not say positively whether he made a Wassermann test or not; that he did not know what the Wassermann test showed except from what some other person told him, and that that was the way all such reports were made. The witness further stated that at the time he

made the report he there stated that he heard no "murmurs" of the heart and that he stated in his report that the sounds of the heart were good; that he found no aortic insufficiency at that time; that he found enlargement of the boundaries. The witness further testified that the report he made in August, 1918, was the first history of the case he made and did not take into account subsequent examinations. Two other doctors testified on behalf of defendants and in answer to hypothetical questions gave as their opinion that the cause of plaintiff's suffering was syphilis and that the injury in 1918 did not produce his present condition.

The evidence tended to show that plaintiff was in good health before the accident and that immediately thereafter he was unable to work, lost considerable weight and was in poor health. Whether there was a causal connection between the injuries and the subsequent condition was a question of fact for the jury. Chicago Union Traction Co. v. May, 221 Ill. 580; Hehthaler v. Crane Co., 248 Ill. App. 267. And even if plaintiff did in fact have syphilis prior to the injury, it appears that it did not trouble him, and if it was increased or aggravated by the injury complained of, he would be entitled to recover to the extent of the increase or aggravation of his disease. Chicago City Ry. Co. v. Mazey, 213 Ill. 274. In connection with this point the defendants contend that the court erred in refusing to give instruction 5 requested by them, whichwas to the effect that there was no evidence that the injuries sustained by the plaintiff increased or aggravated any disease with which plaintiff was afflicted at the time of the accident, and that there could be no

recovery of damages for increasing or aggravating any pre-existing disease. We think this instruction was not warranted by the evidence in the record. As stated, even if the jury believed plaintiff was afflicted with syphilis prior to the injury, they might also well believe that the disease was aggravated by the accident. Nor was it necessary, as defendants contend, that before plaintiff could recover for the aggravation of any disease such matter should be set up in the declaration. Chicago City Ry. Co. v. Saxby, supra; 8 N. C. L. 830. Moreover, the point is not tenable for there was no question of variance raised on the trial. The point could not be saved merely by offering an instruction, but the variance should have been specifically pointed out.

4. Complaint is also made on account of the argument of counsel for plaintiff to the jury that the Government was paying compensation to plaintiff on account of the injuries sustained by him in the performance of his duties and not because he was suffering from a disease, and telling the jury they might consider this fact in passing on the question whether Dr. Crouch's examination, which indicated that plaintiff was suffering from syphilis, was proper diagnosis. Objection was made to this by counsel for the defendants. Counsel for plaintiff concedes that this was not a proper matter to be considered "under ordinary circumstances" but that it was not improper in the instant case because the question of compensation was first brought into the case by counsel for the defendants.

In his argument to the jury counsel for defendants referred to the fact that plaintiff was receiving compensation from the United States and all plaintiff's counsel said in this respect was in his closing argument. In arguing this point to the jury he said: "It is only competent in this way; it tends to discredit the testimony of this doctor from the hospital there, as to his diagnosis. It tends to show that it wasn't his diagnosis, that he was testifying wrong when he said that it was his diagnosis that this man's condition wasn't due to this accident, but was due to syphilis and other things." And it is further contended in the brief that at any rate the jury were entitled to consider this as tending to impeach the doctor's testimony. We think the argument was improper and should not have been made. Objection to it was sustained and the court specifically instructed the jury that the fact that plaintiff had been and was receiving compensation from the United States Government, or that he may receive compensation in the future, or that he was authorized to prosecute a suit by the Government, should not be taken or considered as any evidence whatever of the liability of the defendants for the injuries sustained; nor should it be considered as any evidence whatever that "plaintiff's present physical condition and disability, if any, is the result of the bodily injuries received in the accident in question." They were further instructed that if they believed from the evidence that prior to the injury complained of the plaintiff was afflicted with ailments or disabilities and that such ailments or disabilities were still in existence, he could not hold the

the defendants responsible for them. We think the jury were clearly instructed that plaintiff could not recover for any disabilities unless they resulted from the injuries he received when he was thrown from the wagon. In these circumstances we could not be convinced in holding that the argument was so prejudicial as to warrant a reversal of the judgment.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.

TAYLOR, J. concurs.

THOMSON, P.J. DISSENTING:

I am unable to concur in the foregoing decision of this case. In my opinion the trial court should have held as a matter of law that under the evidence the plaintiff was guilty of contributory negligence and therefore my opinion is that the trial court erred in denying the defendant's motion for a peremptory instruction. In my opinion the plaintiff was shown on his own theory of the case as supported by his own testimony and that of his witnesses, to have been guilty of contributory negligence as a matter of law. Although all the details involved in the plaintiff's theory of the case at bar are not the same as the facts presented in the case of Campbell v. Chicago City Ry. Co., 212 Ill. App. 344, my opinion is that what this court said in that case, is applicable here.

It may be admitted that, under the theory of the occurrence as testified to by the plaintiff and his witnesses,

a reasonable person, situated as the plaintiff was, at the time he began to make the turn, might have believed that he had ample time to complete the turn and clear the southbound track without being struck by the approaching car. But it seems certain, from a consideration of all the testimony submitted in behalf of the plaintiff, that as he was making the turn, it became apparent that a collision was inevitable, unless there was either a material slackening of the speed of the car or a material quickening in the pace at which the plaintiff was driving his horse across the track. That the plaintiff had a full view of the oncoming car, during practically the entire turn he made across Dearborn street, is apparent. The plaintiff himself testified that just as he was about to cross over the southbound track, he looked at the approaching car again and saw that it had not as yet reached the Quincy street crossing. The plaintiff was passing over the track apparently, from the testimony, not very far south of the south side of Quincy street. He testified that he observed the car coming at a speed of about 15 miles an hour; that from the point at which he then was, he would have to go about 25 feet to clear the track, but that he continued to drive his horse over the track, at the speed of about 3 miles an hour. It is not a question of whether the plaintiff, under those circumstances, actually thought he could get across safely, but the question is, what conclusion would a reasonable person, in the exercise of due care for his own safety, have thought about the situation and what would he have done under those circumstances. That several of the plaintiff's own witnesses differed with his view of the situation is demonstrated by an examination of their testimony. They gave it as their opinion that as they saw the situation they considered that a collision was inevitable if the two vehicles continued at their respective rates of speed.

It may be true, as counsel for the plaintiff seems to contend, that these various witnesses formed their opinions at different stages of the progress of events, as the plaintiff made his way across the street. But, as stated above, the plaintiff's view of the on-coming car, was at no time interfered with, and furthermore, it is apparent from the testimony submitted on the plaintiff's theory of the case, that even a slight quickening of the pace of his horse, at almost any point, would have avoided a collision, for the plaintiff's witnesses all say that he had nearly cleared the track when the car struck the wagon. The plaintiff was bound to exercise a reasonable judgment in view of all the circumstances, not alone when he began to make his turn across the street, but throughout its progress. Where one deliberately drives upon the tracks of a street railroad company, especially between street intersections, knowing that a car is approaching at a rapid rate of speed, and proceeds over the tracks at such a rate as in the minds of all reasonable persons would make a collision inevitable, unless the street car is stopped or materially slowed down, he is guilty of negligence as a matter of law. What the Supreme Court said to that effect in Chicago Union Traction Co. v. Jackson, 217 Ill. 404, is applicable here, although in the case cited the court held that under all the facts presented there, the issue of contributory negligence had properly been left to the jury. To the same effect are the decisions in Smith v. Chicago General Ry. Co., 86 Ill. App. 647; Moreland v. Chicago City Ry. Co., 241 Ill. App. 184, and Pignta v. Chicago City Ry. Co., 234 Ill. 460, 464; Furnell v. Chicago City Ry. Co., 221 Ill. App. 343; Lee v. Chicago City Ry. Co., 127 Ill. App. 510.

The occurrence involved in the case last cited, happened at a street intersection. The occurrence involved in the case at bar happened between street intersections. Inthe case last cited the plaintiff apparently paid no attention whatever to the street car, after first observing it 250 or 275 feet away. In the case at bar, the plaintiff first saw the car at about the Adams street intersection and he again observed it just as he was about to pass over the southbound track, at which time the car was approaching Quincy street. That the plaintiff was in a position of peril is apparent from the testimony of his own witnesses, who realized, as one of them put it, "from the speed of the car and the way the horse and wagon were just poking along," that"he could not possibly clear the track." As stated by this court in the case last cited, the plaintiff was an adult of experience who was accustomed to drive over the city streets. He will be presumed to have had the capacity of making some effort to remove himself out of the way of threatened peril, and he will also be presumed to have had the capacity of making some effort, when he was in a place where danger from approaching cars is liable to occur, to keep himself advised of their approach and especially so when he has just seen a car coming upon the track he is crossing. He would have removed himself from the threatened peril in this case if he had made even a slight effort. In my opinion, one proceeding to turn across the street in the middle of the block in front of a car approaching at a speed of 12 to 15 miles an hour, should watch the situation as he proceeds, and at least quicken his pace beyond 3 miles an hour if it becomes necessary to do so in order to avoid a collision, and further, that a reasonable and proper

observation, exercised by the plaintiff in this case, would have disclosed the danger of the situation to him, in which event he could and would have successfully avoided it. And, in as much as the plaintiff failed in this, I am of the opinion he should be held to have been guilty of contributory negligence as a matter of law.

abandoning, according to the statistic in this case, would have diminished the danger of its application to him, in which event he would not have necessarily invoked it. And, in so doing, he the plaintiff failed in this, I do not intend to decide, he would be more than mindful of constitutional rulings as a matter of law.

Opinion filed June 20, 1923.

288 - 27764

32161

HERBERT E. BRADLEY, Appellee, v. JOHN A. KELLY, et al	APPEAL FROM SUPERIOR COURT, COOK COUNTY.
On appeal of John A. Kelly, Appellant.	

Certiorari denied

230 I.A. 661

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Complainant filed a bill against John A. Kelly, and others whose rights are not here involved were made nominal defendants, praying that an accounting be had and that Kelly be decreed to pay whatever amount should be found due upon such an accounting. The suit was based upon a written contract entered into between complainant, Herbert E. Bradley, a practicing lawyer of Chicago, and the defendant, John A. Kelly, dated September 25, 1918. Among other things, Kelly, in his answer, contended that the contract was null and void, and to determine this question the matter was heard by the chancellor. After considerable evidence was introduced by both sides a decree was entered finding the contract to be valid and binding and the matter of the accounting was referred to a master in chancery, the right being reserved by both parties to question the decree after the coming in of the master's report. The master took the evidence and stated the account wherein he found that there was due and owing from the defendant to the

complainant $14,051.70. The defendant filed objections to the report which were overruled, and before the chancellor they were ordered to stand as exceptions. The master's report was approved except as to two items, $1650 and $17.59, aggregating $1667.59, which were disallowed and a decree entered for the balance, $12,384.11. The defendant excepted to the entry of the decree and prosecutes this appeal.

The complainant in this court has filed a number of cross errors, and particularly calling in question the disallowance by the chancellor of the two items aggregating $1667.59. He is, however, in no position to urge these cross errors here for the reason that he made no objection to the decree as entered.

The record discloses that in 1904 there were two mining companies owning property in Montana, and that later a railway company was organized and constructed about nine miles of railroad. These companies got into financial difficulties and in 1908 a receiver was appointed for the Montana property. A creditors' committee was organized for the purpose of protecting their interests and this committee employed the law firm of DuChesney, Bradley and Becker to look after their interests in a legal way. Complainant Bradley was a member of this firm. Later he seems to have withdrawn from it and attended to the matters himself. The defendant Kelly was a member of the creditors' committee part of the time and part of the time he was not. He seems to have furnished nearly all of the money in endeavoring to save some of the property and for this purpose advanced large sums of money from time to time, aggregating nearly $60,000.00. The legal end of the matter was handled by Bradley. The record

complainant $16,001.70. The interest filed objections to the report which was argumentative, and before the commissioner they were allowed to stand as exceptions. The master's report was approved except as to two items, $160 and $17.50, aggregating $177.50, which were disallowed and a final order for the balance, $16,824.12. The defendant excepted to the entry of the decree and prosecutes this appeal.

The complainant in his court has filed a number of cross errors, and particularly calling in question the disallowance by the chancellor of the two items aggregating $177.50. He is, however, in no position to raise these cross errors here for the reason that he has no exceptions to the decree as entered.

The record discloses that in 1906 Henry Cross had sold the complainant Bailey property in Anderson, and that later a partnership was organized and incorporated under the name of Bailey. These complainant and Cross individually were in 1908 a partner and associated for the Cross property. A contractual condition was organized for the purpose of protecting their interests and this condition required the sale of certain map. Bradley and Hooker to look after their interests in a legal way. Complainant Bailey was a member of this firm. Later he seems to have withdrawn from it and attached to the business firm. The defendant Bailey was a member of the contractual association part of the time and part of the time he was not. He seems to have furnished nearly all of the money in connection to some case of the property and for this purpose advanced large sums of money from time to time, aggregating nearly $20,000. The legal end of the matter was handled by Hooker. The record

is voluminous and we think it would serve no useful purpose to discuss all of the evidence introduced, but on the contrary that it would tend to confuse the issues. We will, therefore, state only such matters as we think pertinent to the decision of the case.

Bradley made a number of trips to Montana, covering a period of years, in looking after the litigation there. He also made a trip to New York and Boston and one to Buffalo and claims to have represented Kelly in these matters from January, 1910, until July 26, 1918. The Montana property was finally purchased by Kelly. There was substantially no return from the property. It was thought advisable to sell the rails of the railroad and thus save some of the investment. There were also negotiations for the re-organization of the companies in 1912. The value of the rails on account of the war increased, and about June, 1918, after considerable negotiations by Kelly and Bradley, the rails were sold by Kelly for $65,000.00. No money, however, was received by Kelly, payment being made in the form of three notes for $5,000.00 each, seven collateral notes of $5,000.00 each, and 40,000 shares of stock aggregating $15,000.00, making the total $65,000.00. From the sale of the rails and the shares of stock Kelly received $75,458.37.

By the terms of the contract of September 25, 1918, under which complainant seeks an accounting in this case, Kelly was first to be paid certain advances made by him, and the remainder was to be divided between himself and Bradley, Kelly receiving two-thirds and Bradley one-third. But it was provided that in no event was Bradley to receive less than $10,000 nor more than $20,000.00. The master found certain advances made by Kelly which should be allowed him under the terms of the contract amount-

in volumnous and we think it would serve no useful purpose to discuss all of the evidence introduced, but on the contrary that it would tend to confuse the issues. We will, therefore, state only such matters as we think pertinent to the decision of the case.

Duffy was a maker of wine in Canada, covering a period of years, as indicated after the litigation there. He also made a trip to New York and Boston and one to Buffalo and claims to have commenced fully in those matters from December, 1918, until July 21, 1921. The Canadian property was finally purchased by Duffy. There was universality in taking from the property. It was thought advisable to sell the media of the realized and some days some of the investment. There were also negotiations for the re-organization of the companies in 1919. The value of the media on account of the war increased, and about June, 1919, after considerable negotiations by Duffy and Jacoby, the media were sold by Duffy for $20,000.00. It seems, however, was required by Duffy, payment being made in the form of three notes for $8,000.00 each, three collateral notes of $5,000.00 each, and 40,000 shares of stock aggregating $12,000.00, making the total $48,000.00. From the sale of the media and the source of these Duffy received $7,488.87.

By the terms of the contract of September 22, 1919, under which complainant seeks an accounting in this case, Duffy was tried of by full certain interest duly by 100, but the proceeds was to be divided between himself and Jacoby, Duffy receiving two-thirds and Jacoby one-third. But it was realized that in no event was Duffy to receive less than $15,000 nor more than $20,000. The Jacoby Trust Company attempts such by Duffy which should be allowed the under the terms of the contract [illegible]

ed to $14,625.00. This was deducted from the $75,459.30 received by Kelly, leaving a balance of $60,833.37. One - third of this amount was to be paid to Bradley, but according to the contract his share was not to exceed $20,000.00. The master, therefore, found that Bradley was entitled to $20,000.00 less certain sums which he had already received, and which, being deducted, left a balance of $14,051.70. The court made a further deduction of the two items mentioned above and found that there was due and owing from Kelly to Bradley, under the terms of the contract of September 25, 1918, the sum of $12,384.11.

The defendant contends that the contract was a mere nudum pactum because complainant was required to do all the work that he did after the contract was executed by virtue of a prior agreement entered into between the parties in December, 1915; thatthe contract is null and void for the reason that the relation of attorney and client existed between them at the time it was executed; that the contract is void because prior to the time it was executed complainant misrepresented to the defendant the status of litigation in Montana, and further, that the contract is unconscionable and void, apparently on the ground that the charge made by Bradley was entirely too much for the services rendered.

1. The firm of McChesney, Bradley & Becker had been receiving some money from time to time for services, and later money was received by Bradley for his services. On May 21, 1915, he wrote the defendant Kelly a letter wherein he stated that some time prior the question of his fees had been discussed, and he states: "At that time, or shortly after, you gave me $500.00. Inasmuch as I have some large amounts coming

ed to $44,000.00. This was deducted from the $45,125.00 received by Kelly, leaving a balance of $20,000.00. The - value of this account was to be paid to Bradley, but according to the contract air-cover was owed $27,000.00. The auditor, however, found that Bradley was entitled to $40,00.00 in less performance which he had already received, and which, being deducted, left a balance of $14,000.00. The court made a further deduction of the two items mentioned above and found that there was due and owing from Kelly to Bradley, under the terms of the contract of September 22, 1918, the sum of $12,000.00.

(4) The defendant evidence that the contract was a mere gamble involve complicated and replete in all the work done by the other one mentioned was measured by virtue of a prior agreement entered into between the parties in December, 1918; that the contract is void and void for the reason that the relation of attorney and client existed between one at the time it was executed; that the contract is void because prior to the time it was executed complained misrepresented to the defendant the amount of litigation in Boston, and further, that the contract is unconscionable and void, primarily on the ground that the charge made by Bradley was entirely too much for the services rendered.

I. The firm of Dorrance, Bradley & Bowers has been receiving some money from time to time for services, and Isaac Bradley was related by Bradley in his evidence. On the 4, 1919, he wrote the defendant Kelly a letter stating in substance that some time prior the creation of his firm had been discussed, and he stated that at that time, or shortly after, promised he $500.00. Inasmuch as I have made large monies coming

due on the 27th of this month, I wonder if your business is in such shape that you can afford at this time to give me another $500.00. These amounts which you pay to me I shall consider to be applied on the receiver's certificates which I hold as they ultimately will have to go to you. You know, of course, they were turned over to me to secure my fees in the matter.

I wish you would think the whole matter over and suggest some final disposition and we will reduce it to writing so if anything happens to either of us we will have records."

On December 10 following the date of the letter Kelly went to Bradley's office in reference to the matter and thereupon Bradley made a pencil memorandum on the back of the letter, which is as follows: "Stockholders and bondholders who have provided financial means and Amador committee to be given stock for their interest on re-organization on payment of assessment as agreed. N.E.B. (meaning Bradley) to have one-eighth interest in total re-organization in stock. N.E.B. (meaning Bradley) also to have $3500.00 to be paid in two years to cover all fees to conclusion of litigation and re-organization. N.E.B. (meaning Bradley) to also care for Mr. Kelly's interest, and in case of his decease to care for the interest of his heirs to final settlement."

Shortly before July 26, 1918, some of the collateral that Kelly was to receive in payment of the rails which he sold shortly before that time was mailed to him in care of Bradley. Kelly called at Bradley's office for the collateral and Bradley claimed that he was entitled to one-third of what was realized. Kelly disputed this and took the papers with him from Bradley's office. Later some more of the collateral came to Bradley in

due on the 27th of this month, I wonder if you mightbe in so much danger that you can afford at this time to give me another £200.00. Those amounts which you pay to me I simply envisage to be credited on the manager's certificates which I hold as they ultimately will have to go to you. You know, of course, they were issued over to me to secure my free in the region.

I wish you would think the whole matter over and suggest some final disposition and we will venture it to writing so if anything happens to either of us we will have records."

On December 10 following the date of the letter Kelly wrote to Bradley's office in reference to the matter and there upon Bradley made a penal memorandum on the back of the letter, which is as follows: "Shareholders and workmen who have provided financial means and market conditions to be given a most far their interest as representation to against it accordingly as stated. K.E.E. (meaning Bradley) to have non-eligible interest in Ital pre-organisation in which. K.E.E. (meaning Bradley) also to have 25%, or to be said to the press in order all free to consideration of liabilities and reorganisation. K.E.E. (meaning Bradley) is also sure for or, Kelly's interest, and in view of his decease to sure for the interest of his heirs in final settlement."

Shortly before July 20, 1919, some of the militarist that Kelly was to receive in payment of the mills which he sold shortly before time was called to him in aid of Bradley. Kelly called at Bradley's office for the militarist and Bradley claimed that he was entitled to re-hold of what was realised. Kelly disputed this and took the papers with his from Bradley's office. Later some more of the militarist came to Bradley in

the same manner, which he refused to surrender. On September 13, 1918, Kelly filed a bill against Bradley to recover this collateral and sought an injunction to restrain Bradley from hypothecating it. An order was accordingly entered restraining Bradley. About ten days after the filing of this suit by Kelly he was notified by Bradley by telephone that Bradley had received information from Montana that in the litigation there pending one McIntosh, who claimed to have some interest in the Montana property, had a writ of injunction issued enjoining the turning over of the rails to the party who had purchased them from Kelly, and Bradley requested that Kelly come to his office, which Kelly did. Bradley testifies that this was on September 24, 1918; that the matter was discussed and that it was decided that Bradley would have to go to Montana to look after the litigation personally; that thereupon he dictated the contract in question and the next day Kelly returned, looked it over, and it was executed by both parties. Kelly testifies substantially to the same effect except that he says the contract was dictated and signed the same day, September 25, 1918. On September 25, after the contract was signed, Bradley went to Montana where he remained for about a month and apparently succeeded in making a staisfactory disposition of the litigation there pending, so that there was no hindrance in the delivery of the rails to the purchaser.

The contract in question provides that Kelly is to discontinue the suit brought against Bradley on September 13, 1918. It further provides that Bradley was to leave at once for Montana to take car of the suit brought there by McIntosh against Kelly and others in reference to the sale by Kelly of the rails for $65,000.00 to one Allen. It also provided: "Both parties hereto agree that out of the moneys received from the

the same manner, which he returned to Australia. On September 13, 1938, Kelly filed a bill against Bradley to recover this settlement and sought an injunction to restrain Bradley from disposing of it. He also sought additional material restitution. About ten days after the filing of this suit by Kelly he was notified by Bradley by telephone that Bradley had received information from Shannon that in the litigation there pending one Malatesta, who claimed to have some interest in the business property, had a writ of injunction issued enjoining the turning over of the money to the party who had purchased from Kelly, and Bradley suggested that Kelly come to his office, which Kelly did. Bradley testified that this was on September 24, 1938; that the writ was discussed and that it was decided that Bradley would have to go to Boston to look after the litigation personally; that therefore he directed the contract in question and the deed by Kelly received, signed it over, and it was executed by both parties. Kelly testified substantially to the same effect except that he says the contract was dispatched after the contract was signed, Bradley went to Boston where he remained for about a week and apparently succeeded in settling a substantial disposition of the litigation that pending, so that there was no interference in the delivery of the title to the purchaser.

The contract in question provides that Kelly is to discontinue the city property against Bradley on September 23, 1938. It further provides that Bradley was to have at once for Boston in view of the suit brought there by Malatesta against Kelly and others in reference to the sale by Kelly of the title for $65,000.00 to one Allen. It also provided: "Both parties hereto agree that out of the moneys received from the

railway, there shall be deducted the amount necessary to settle with the said McIntosh, also Two thousand Dollars to reimburse Kelly. Further, there shall be deducted such amounts as both parties hereto agree upon to be returned to the bondholders not exceeding $10,000.00. * * * After these amounts and the McIntosh amount shall be paid or provided for, said Bradley shall be entitled to one-third (1/3) of the remainder for solicitor's fees; such amount, however, shall not be less than $10,000.00 and not more than $20,000.00."

The contract further provided that Bradley disclaim any interest in and to certain other property in Montana except some lots which were to be conveyed to Bradley. It further provided that as to certain mining claims, the title should remain in Kelly until a further agreement had been reached by both parties. Other property was also mentioned, and then the contract contained the following: "All of the necessary litigation, negotiations, contract and business necessary to be performed in and about this agreement and the property thereof shall be taken care of by the said Bradley without expense to the said Kelly, or the said stockholders from this time until the several matters shall be concluded. The actual expense, however, shall be paid for by the said Kelly at his option."

We think it cannot be said that the memorandum agreement written by Bradley on the back of the letter of December 10, 1915, contemplated the services which were provided for in the contract of September 25, 1918. It is entirely too uncertain and indefinite in this respect. Nor can we say that the amount claimed by Bradley is so great as to render the contract unconscionable, because at the time the contract was made, September 25,

rately, there shall be deducted the amount necessary to retire with six per cent interest, also two thousand dollars to reimburse Kelly. Further, there shall be deducted such amounts as both parties hereto agree upon to be incident to the venture not exceeding $10,000.00. * * * After these amounts and the interest amount shall be paid as provided for, said Bradley shall be entitled to one-third (1/3) of the remainder for solicitor's fees; such amount, however, shall not be less than $15,000.00 and not more than $25,000.00."

The contract further provided that Bradley should release any interest in and to certain other property in Montana except some lots which were to be conveyed to Bradley. It further provided that as to certain mining claims, the title should remain in Kelly until a further agreement had been reached by both parties. Other property was also mentioned, and then the contract contained the following: "All of the necessary litigation, negotiations, contract and business necessary to be performed in and about this agreement and the property thereof shall be taken care of by the said Bradley without expense to the said Kelly, or the said stockholders from this time until the several matters shall be concluded. The actual expense, however, shall be paid for by the said Kelly at his option."

We think it cannot be said that the contingent agreement written by Bradley on the back of the letter of December 10, 1915, contemplated the services which were provided for in the contract of September 21, 1916. It is entirely too uncertain and indefinite in this respect. Nor can we say that the amount claimed by Bradley is so great as to render the contract unconscionable, because at the time the contract was made, September 21,

1918, Bradley had rendered a great deal of services and apparently had made valid claims to a certain interest in the property in Montana. It was then uncertain whether the sale of the rails would be consummated and if anything at all would be realized and, therefore, what Bradley was to receive was entirely contingent upon his success in disposing of the litigation in Montana. If the fact is as defendant contends, that no injunction was actually issued against him, but on the contrary that he was out of the Montana litigation, we think this is not of controlling effect because whether he was actually enjoined or was a party to the litigation in Montana, as we think he was, the litigation there might have prevented the delivery of the rails and, therefore, nothing would be realized by Kelly out of that deal.

2. Nor do we think that the fact that the relation of attorney and client existed between the parties would render the contract null and void. Kelly seems to have been a man of affairs and to have had considerable business experience. He was about 65 years of age. He makes no contention that he did not understand the terms of the contract, but his contention seems to be that Bradley took advantage of the situation and made him believe that the Montana litigation was serious when, in fact, it was not, and thereby obtained his signature to the contract. The evidence shows that immediately upon the signing of the contract Bradley went to Montana and was there about a month successfully disposing of the litigation there. In these circumstances we think we would not be warranted in holding that the finding of the chancellor, who saw and heard the witnesses, that the contract was "voluntarily, deliberately and advisedly" entered into by the parties; that Kelly knew the nature and effect of the contract; that his consent to it was not obtained by any misrepresentation, fraud or undue influence of Bradley, but on the contrary that

bid. During the reviewing a great deal of evidence was apparently now made valid claims to a certain interest in the property in question. It was then uncertain whether the wife of the will would be convenanted and if anything at all would be received and, therefore, well knowing she is treaty the certain conditions upon his message in discussing of the Litigation in Kansas. If the fact is as defendant contends, that no litigation was actually issued against him, but on the contrary that he was out of the Kansas Litigation, we think this is not of controlling effect because whether he was actually enjoined or not a party in the Litigation in Kansas, as we understand he was, the litigation there might have prevented the delivery of the bills and, therefore, knowing would be restored by Kelly out of that fund.

8. Nor do we think that the fact that the relation of pleaded and client existed between the parties would cause the contract null and void. Kelly seems to have been a man of ability and to have had considerable business experience. He was about 48 years of age. We make no contention that he did not understand the terms of the contract, but his contention seems to be that Dwelley took advantage of the situation and made his believe that the Kansas Litigation was serious when, in fact, it was not, and thereby obtained his signature to the contract. The evidence shows that immediately upon the signing of the contract Dwelley went to Indiana and was there about a month personally directing of the Litigation there. In these circumstances we think we might not be warranted in believing that the finding of the chancellor, who was the sworn to witnesses, that the contract was "fiduciarily, fairly and equitably" entered into by the parties; that Kelly knew the nature and effect of the contract; that his consent to it was not obtained by any misrepresentation, fraud or undue influence of Dwelley, but on the contrary that

the contract was fair, just and not unconscionable, is against the manifest weight of the evidence. From this it follows that the decree of the Superior Court of Cook County must be affirmed.

DECREE AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

Opinion filed June 20, 1923.

297 - 27773

SARAH HARRIS,

Appellee,

v.

CITY OF CHICAGO, et al on appeal of CITY OF CHICAGO,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought suit against the City of Chicago and Harry Hirshorn to recover damages for personal injuries claimed to have been sustained by her by reason of her falling and being injured on account of a defective sidewalk in front of Hirshorn's property in Chicago. During the trial the suit was dismissed as to Hirshorn. At the close of plaintiff's evidence counsel for the City of Chicago moved for a directed verdict in his favor, which motion was denied. Defendant stood by its motion and the cause was then submitted to the jury on plaintiff's evidence alone. The jury rendered a verdict in plaintiff's favor for $2250.00 upon which the court entered judgment.

The only contention made by the defendant is that the only conclusion that can be drawn from the evidence is that plaintiff was guilty of negligence which, at least, contributed to the injuries she received - that she was not in the exercise of ordinary care for her own safety and, therefore, the court should have given the peremptory instruction requested to find the defendant not guilty.

It appears from the evidence that plaintiff lived at 816 North California avenue, Chicago; that she had been living at that place for ten or eleven years prior to the date she was injured; that about 4:30 o'clock in the afternoon of June 30, 1919, she left her home to do some shopping and was walking north on the sidewalk on the west side of California avenue; that when she was in front of number 832 North California avenue, eight doors from where she lived, she stepped in a hole or depression in the cement sidewalk which caused her to fall and as a result of which she sustained the injuries complained of. The sidewalk was constructed of cement and plaintiff had passed over it five or six times a week for a number of years. She saw the defect in the sidewalk where she fell and knew that it had been there for a number of years prior to the time she was injured. As to the nature of the defect, plaintiff testified: "The hole in the sidewalk must have been three feet wide and ran into kind of a V-shape next to the house. The hole was about three inches deep. There was no cement in it. There was a little broken stone in it." She further testified that at the outer side of the walk the hole was about three feet wide and ran into a V-shape until it was about six inches wide on the inner side of the walk. She testified that her eyesight was good and that her health was good; that "it seems to me that the hole had been there all of the time that I lived there. It must have been five or six or eight years, somewhere along there. I was just walking along as I said, and as near as I could see I must have stepped right into this part with my foot and it throwed me into the hole."; that her foot did not turn but that she pitched forward. She further testified that the day was bright and it appears that there was nothing to distract her attention at the time; "I was walking in the center of the walk.

It appears from the evidence that plaintiff lived at 812 North California avenue, Chicago; that she had been living at that place for ten or eleven years prior to the date she was injured; that about 4:30 o'clock in the afternoon of June 30, 1919, she left her home to go some shopping and was walking north on the sidewalk on the west side of California avenue; that when she was in front of number 838 North California avenue, right there and there she lived, she stepped in a hole or depression in the cement sidewalk which caused her to fall and as a result of which she sustained the injuries complained of. The defendants are interested as owners and plaintiff had passed over it five or six times a week for a number of years. She saw the defect in the sidewalk where she fell and knew that it had been there for a number of years prior to the time she was injured. As to the nature of the defect, plaintiff testified: "The hole in the sidewalk must have been three feet wide and ran into kind of a V-shape back to the house. The hole was about three inches deep. There was no cement in it. There was a little broken stone in it." She further testified that at the outer edge of the walk the hole was about three feet wide and ran into a V-shape until it was about six inches wide on the inner side of the walk. She testified that her eyesight was good and that her health was good; that "it seems to me that the hole had been there all of the time that I lived there. It was more than five or six or eight years, remembers going there. I was just walking along on I said, and as sure as I should see I must have stepped right into this part with my foot and it threw me into the hole."; that her foot did not turn but she fell sideways forward. The further testified that the day was bright and it appears that there was nothing to distract her attention at the time; "I was walking in the center of the walk.

The place where the cement was out was about three inches or more deep, where I stepped in."

A Mrs. Krause testified for the plaintiff that she had lived at 834 North California avenue for a number of years prior to the date in question; that after plaintiff fell she assisted her to her home; that she saw the hole in the sidewalk but could not say how long it was there; that there were several holes in the sidewalk, but she paid no particular attention to them; that she did not know how large the hole in the cement was. She further testified: "I would not say that the hole alongside where Mrs. Harris was at the time I helped pick her up was as wide as three feet; it was a small place. I do not think it extended all the way across the sidewalk. There were several places there where the top layer of cement had been worn away or kicked away, or in some way removed and this was one of them. I could not say how deep the hole was." The cross-examination then proceeded: "Q. Well, as a matter of fact, it was only a smooth layer of the cement that was removed off the top, wasn't it? A. Well, yes. It was down a little bit, enough to catch somebody's shoe or heel or so." This is all the evidence as to the condition of the sidewalk.

Counsel for plaintiff contends that whether a person in walking over a sidewalk that is known to be in a defective condition is in the exercise of ordinary care for her own safety, is a question of fact for the jury. This is not a correct statement of the law. The general rule is that negligence is a question of fact for the jury, but when the facts are admitted and all reasonable minds would agree that plaintiff in an action for personal injuries was not in the exercise of ordinary care, then the court may, as a matter of law, find that plaintiff's own

the place where the accident was but was about three inches or more deep, which I stepped in."

A Mrs. Kenney testified for the plaintiff that she had lived at 834 South California avenue for a number of years prior to the date in question; that after plaintiff fell she assisted her to her home; that she saw the hole in the sidewalk but could not say how long it was there; that there were several holes in the sidewalk, but she paid no particular attention to them; that she did not know how large the hole in the cement was. The further testified: "I could not say that the hole alongside where Mrs. Smith was at the time I helped pick her up was as wide as three feet; it was a small place. I do not think it extended all the way across the sidewalk. There were several places there where the top layer of cement had been worn away or flaked away, or in some way crumbled and this was one of them. I could not say how deep the hole was." The cross-examination then proceeded: "Q. Well, as a matter of fact, it was only a small layer of the cement that was worn off the top, wasn't it? A. Well, yes. It was down a little bit, enough to make somebody's shoe or boot go up." That is all the evidence as to the condition of the sidewalk.

Counsel for plaintiff contends that without a jury's ruling over a nonsuit that it cannot be in a defective condition in the question of contributory cause for her own safety, is a question of fact for the jury. This is not a correct statement of the law. The general rule is that negligence is a question of fact for the jury, but when the facts are admitted and all reasonable minds would agree that plaintiff in an action for personal injuries was not in the exercise of ordinary care, then the court may, as a matter of law, find that plaintiff's own

negligence brought about or contributed to the injury so as to defeat a recovery. Austin v. Public Service Co., 299 Ill. 112; Howes v. C. & E. I. R. R. Co., 217 Ill. 500; Pell v. Joliet, Plainfield & Aurora R. R. Co., 238 Ill. 510.

Under the circumstances as disclosed by the evidence we think all reasonable minds would reach the conclusion that plaintiff was not in the exercise of ordinary care for her own safety, and, therefore, the court should have given the peremptory instruction requested by the defendant. In City of Quincy v. Barker, 81 Ill. 300, it was held that where a person acquainted with the condition of a sidewalk over which he is passing in daylight walks upon a portion of it which is obstructed with an accumulation of ice, when there is plenty of space on either side of it over which he might pass and avoid such obstruction, he is guilty of such want of care as to prevent a recovery for any injury he might sustain by reason of slipping on the ice. And in the case of Lewance v. Repew, 80 Ill. 119, it was held that where a person in full possession of his faculties passing over a sidewalk in daylight with no crowd to jostle or disturb him and nothing occurring to distract his attention, he is under obligation to use his eyes to direct his footsteps, and if he fails to do so, he is negligent and cannot recover for injuries which he has sustained. Other cases to the same effect are City of Chicago v. McDonald, 111 Ill. App. 436; King v. Swanson, 216 Ill. App. 294.

It is the duty of the city to use reasonable care to see that its sidewalks are reasonably safe for the use of the people. It is not every defect in a sidewalk, of which the city has notice, that will render it liable to persons who are injured while passing over it, even where such person is not negligent.

negligence brought about or contributed to the injury so as to defeat a recovery. Martin v. Public Service Co., 200 Ill. 232; Sweet v. C. & E. I. R. R. Co., 207 Ill. 240; Cole v. Illinois Steel Co., 208 Ill. 234.

Under the circumstances as disclosed by the evidence we think all questions that would lead to the conclusion that plaintiff was not in the exercise of ordinary care for her own safety, and, therefore, the court should have given the peremptory instruction requested by the defendant. In City of Chicago v. Jordan, 82 Ill. 529, it was held that if a person committed with the consent of a company over which he is passing in daylight walks upon a portion of it which is obstructed with an accumulation of ice, when there is plenty of space on either side of it over which he might pass and avoid such obstruction, he is guilty of such want of care as to prevent a recovery for any injury he might sustain by reason of slipping on the ice. And in the case of Tomlins v. Jones, 30 Ill. App. 19, it was held that where a person in full possession of his faculties passing over a sidewalk in daylight and in clear or dazzle or similar sun and nothing occurring to distract his attention, he is under obligation to use his eyes in front his footsteps, and if he fails to do so, he is negligent and cannot recover for injuries which he has sustained. Other cases to the same effect are City of Chicago v. Kennedy, 111 Ill. 272, and Chi. Ill. Cent. R. R. Co. v. Jones, 64 Ill. App. 504.

It is the duty of the city to use reasonable care to see that its sidewalks are reasonably safe for the use of the people. If it is not every defect in a sidewalk, of which the city has notice, that will render it liable to persons who are injured while passing over it, even where such person is not negligent.

In the instant case we are not prepared to say that the sidewalk was so defective, taking into consideration all the attendant circumstances, as would render the city liable even if plaintiff was free from negligence. But we do not decide this question for the reason that it has not been mentioned in the case. Plaintiff could have stepped a little to the west and passed along the sidewalk without stepping into the depression, because all the evidence shows that the hole at the west edge of the walk was not more than six inches wide.

Holding, as we do, that all reasonable minds would reach the conclusion that plaintiff was not in the exercise of ordinary care forher own safety, the judgment of the Circuit Court of Cook County is reversed with a finding of fact.

REVERSED WITH A FINDING OF FACT.

THOMSON, P.J. AND TAYLOR J. CONCUR.

FINDING OF FACT:

We find as a fact that plaintiff was not in the exercise of due care for her own safety at the time she was injured.

In the instant case we are not satisfied to say that the statute was so definite, taking into consideration all the attendant circumstances, as would render the city liable even if plaintiff was free from negligence. But we do not decide this question for the reason that it has not been mentioned in the case. Plaintiff could have stepped a little to the east and passed along the sidewalk without crossing into the depression, because all the evidence shows that the hole at the west edge of the walk was not more than six inches wide.

Holding, as we do, that all reasonable minds could reach the conclusion that plaintiff was not in the exercise of ordinary care for her own safety, the judgment of the Circuit Court of Cook County is reversed with a finding of fact.

OTTAWA CITY & VARIOUS AT FAC.

INJUNCTION, P.C. LAS IVTAS ;, (PRIVATE).

VERDICT AT LAW:

We find as a fact that plaintiff was not in the exercise of due care for her own safety at the time she was injured.

Opinion filed June 20, 1923.

302 - 27778

CHARLES M. ROSS, Appellee, v. HENRY LUFT, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of forcible detainer to recover possession of a store at 4435 West Madison street, Chicago. At the close of all the evidence there was a directed verdict in favor of the plaintiff and judgment for possession entered; to reverse which the defendant prosecutes this appeal.

It appears from the evidence that the defendant had been occupying the store for about four years and that at no time did he have a written lease. The rent was $25.00 per month. Prior to June, 1921, the property was owned by Louis Wilking and Mrs. William Tumbler. Apparently there was some talk of the owners selling the premises and about March 1 the defendant's wife saw Wilking, with whom they transacted all their business in reference to renting the property, about obtaining a written lease; that Wilking stated they did not need a written lease; that they could stay there as long as they wished and that if he sold he would protect them. On March 6 Wilking and Mrs. Tumbler wrote the following letter to the defendant: "We kindly beg to advise you that your rent for the coming

Opinion filed June 20, 1923.

502 - 27772

GEORGE E. MOON,

Appellee,

v.

ERNEST LUTT,

Appellant.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of replevin against to recover possession of a stock of 4420 Good Indian chief Cigars. At the close of all the evidence there was a directed verdict in favor of the plaintiff and judgment for possession entered; to review which the defendant prosecutes this appeal.

It appears from the evidence that the defendant had been operating the store for about two years and had at no time did he have a written lease. The rent was $15.00 per month. Prior to June, 1921, the property was owned by Louis Kilking and Joe. Kilker Sunkes. Apparently there was some talk of the owners selling the premises and about April 2 the defendant's wife saw Kilking, with whom they bargained all kinds of things in relation to renting the property, about entering a written lease; that Kilking stated they did not want a written lease; that they could stay there as long as they wished and that if he sold he would protect them. Mr. Moon & Kilking and Joe. Sunkes were the following letter to the defendant: "We kindly ask to advise you that your rent for the coming

year (May 1, 1921 until April 30, 1922) will be $40.00 per month. We should appreciate your decision regarding this on or before April 1, 1921." Shortly after the receipt of this letter the defendant saw Wilking and objected to the rent being increased from $25.00, which he had theretofore been paying, to $40.00 as stated in the letter. Wilking seems to have admitted that the advance was rather high but stated he could do nothing without taking the matter up further with his co-owner Mrs. Tumbler. Thereupon the defendant made a counter proposition and said that he would be willing to pay $35.00 per month, and this was communicated by Wilking to Mrs. Tumbler. On March 17 another letter was written on behalf of Wilking and Mrs. Tumbler to the defendant in which it was stated: "Just a few lines to let you know that the rent is fixed at $35.00." After this, about April 14, when defendant was paying the rent to Wilking, he asked for a written lease but it was refused. Wilking and Mrs. Tumbler sold the property about June 1 to plaintiff. The defendant continued to occupy the store and paid $35.00 per month rent for the months of June, July, August and September. This is substantially all the material evidence in the record.

Plaintiff's position seems to be that since the proposition made in the letter of March 6 to lease the premises for a specified time at $40.00 per month was not accepted but was rejected, and later the second proposition of the owners to let the property to the defendant at $35.00 per month was accepted, no particular time being mentioned, this merely gave the defendant a month to month tenancy and he could be dispossessed at any time upon proper notice. Notice was given and it is conceded that it was sufficient if there was not a binding letting of the premises from May 1, 1921, to April 30,

year (May 1, 1921 until April 30, 1922) will be $20.00 per month. We should appreciate your desirous expediting this as or before April 1, 1921." Shortly after the receipt of this letter the defendant saw Mulkey and advised by the rent being increased from $20.00, which he had theretofore been paying, to $40.00 as stated in the letter. Mulkey seems to have admitted that his answer was rather high but stated he could do nothing without taking the matter up further with his co-owner Mrs. Wendler. Thereupon the defendant made a counter proposition and said that he would be willing to pay $38.00 per month, and this was communicated by Mulkey to Mrs. Wendler. On March 17 another letter was written on behalf of Mulkey and Mrs. Wendler to the defendant in which it was stated: "Just a few lines to let you know that the rent is fixed at $38.00." After this, about April 14, when defendant was paying the rent to Mulkey, he asked for a written lease but it was refused. Mulkey and Mrs. Wendler sold the property about June 1 to plaintiff. The defendant continued to occupy the store and paid $38.00 per month rent for the months of June, July, August and September. Mulkey is responsible all the material evidence to the record.

Plaintiff's position seems to be that when the proposition made in the letter of March 8 to lease the premises for a specified time at $40.00 per month was not accepted but was rejected, and later the second proposition of the tenant to let the property to the defendant at $38.00 per month was accepted, no contract came into being mutually, that only the defendant's mouth to write tenancy and no rents in possession at any time upon proper notice. Mulkey was given and it is conceded that it was sufficient if there was not a binding letting of the premises from May 1, 1921, to April 30,

1922. The plaintiff further seems to concede that if the two letters may be construed together they would not be effected by the Statute of Frauds.

We think it clear from a consideration of all of the evidence that it was understood by both the landlords and the tenant that the latter was to occupy the premises for a year beginning May 1, 1921, at $35.00 per month. The letter of March 6 specifically mentions this period of time and names the rental of $40.00 per month. Shortly after the receipt of this information the tenant objected to the payment of $40.00 and made a counter proposition to pay $35.00 per month, and this proposition was later accepted by the owners. It is perfectly clear that both parties had in mind that there was a letting of the property for a year beginning May 1 at $35.00 per month rent. Inthese circumstances, of course, the plaintiff had no legal right to terminate the tenancy as he sought to do by bringing the present action of forcible detainer. Upon the acceptance by the owners of the terms of defendant's counter proposition of $35.00 per month, the contract was binding and enforcible and was not at all effected by the fact that later the defendant requested a lease in writing.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

1929. The plaintiff further asserts in paragraph four of the Lessees may be construed somehow that they would not be affected by the statute of frauds.

We think as clear from a consideration of all of the evidence that it was understood by both the landlords and the tenant that the Lease was to convey the premises for a year beginning May 1, 1929, at $125.00 per month. The issue of fact upon a specifically mentioned date prior to June 1st seems the period at $40.00 per month. Shortly after the execution of this instrument the tenant entered in the premises at $40.00 and made a monthly payment in July $35.00 per month, and this transaction was later accepted by the owners. It is particularly clear that both parties had in mind that there was a letting of the property for a year beginning May 1 at $35.00 per month rent. Without circumstances, it matter, the plaintiff had no legal right to terminate the tenancy as he sought to do by bringing the present action if therefore determined upon the evidence by the course of the terms of defendant's counter proposition at $35.00 per month, the possession was binding and enforceable and was not at all affected by the fact that later the defendant requested a lease in writing.

The judgment of the municipal court of Chicago is affirmed.

AFFIRMED.

TRUMBOR, P.J. and McSURLY, J. concur.

Opinion filed June 20, 1923

308 - 27784

NORBERT MARTYNOWITZ,

Appellant,

v.

HENRY PENSAGRAW,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of replevin against the defendant to recover an automobile. It was taken on the writ by the bailiff of the Municipal Court and delivered to the plaintiff. Upon the trial of the case before the court without a jury the court found that the right of possession of the property was not in the plaintiff and judgment was entered that defendant recover the automobile and that a writ of retorno habendo issue therefor. Plaintiff being dissatisfied with the judgment appeals.

The evidence shows that one John Dombrowski was dealing in second hand automobiles and for that purpose rented garage space from the plaintiff and from time to time borrowed money from him to enable him to purchase automobiles. On June 25, 1921, Dombrowski being then indebted to the plaintiff on his promissory note for $1,000.00, executed a bill of sale for three automobiles for a consideration of $1875.00. One of the automobiles mentioned in the bill of sale was the one involved in the instant case. Plaintiff's position was that upon the execution of the bill of sale the three automobiles were delivered to him and he surrendered up the $1,000.00 note - that

Opinion filed June 20, 1932

Sup - 27721

MOTOR VEHICLES.

Injunction.

Affirmed.

Appellee.

Mr. JUSTICE DUNCAN delivered the opinion of the court.

Plaintiff brought an action of trover against the defendant to recover an automobile. It was alleged in the writ by the bailiff of the Municipal Court and replevied in the plaintiff. Upon the trial of the case before the court without a jury the court found that the right of possession of the property was not in the plaintiff and judgment was entered that defendant recover the automobile and that a writ of Replevin issue. Plaintiff being dissatisfied with the judgment appeals.

The evidence shows that one John Bonivaski was employing in secret hunt automobiles and for that purpose borrowed garage space from the plaintiff and from time to time borrowed money from him to enable him to purchase automobiles. On June 20, 1932, Bonivaski being then indebted to the plaintiff on his promissory note for $1,000.00, executed a bill of sale for three automobiles for a consideration of $1275.00. One of the automobiles mentioned in the bill of sale was the one involved in the instant case. Plaintiff's position was that upon the execution of the bill of sale the three automobiles were delivered to him and he maintained on the $1,000.00 note - that

the three automobiles were given to him in payment of the $1,000.00. The position of Dombrowski is that the bill of sale was executed merely as security to plaintiff for the money he owed him and not that there was intended to be an actual sale, but that it was understood that Dombrowski should thereafter sell the automobiles and then pay the plaintiff what he owed him; that the three automobiles mentioned were never delivered to plaintiff but were afterwards sold by Dombrowski and he being in financial difficulties did not pay the plaintiff; that he sold the car in question on July 22 to the defendant for $675 executing a bill of sale to the defendant at that time.

It further appears from the evidence that afterwards plaintiff became ill and was taken to a hospital where he was confined for several weeks. He testified that when he was at the hospital he first learned that Dombrowski had sold the car in question; that upon leaving the hospital he endeavored to secure the car but being unable to do so and having learned that it had been sold to defendant, he brought this action of replevin.

It is conceded that plaintiff made no demand on the defendant for the automobile before suing out the writ of replevin, and it is plaintiff's position that the trial judge decided the case against him because there was no demand as the law required, while the position of the defendant seems to be that the court entered a judgment in his favor for the reason that he believed there was no sale by Dombrowski to the plaintiff of the automobile, but that the bill of sale was executed merely as security for the money which Dombrowski owed plaintiff.

We have examined the entire record in this case and

the three automobiles were given to him in payment of the $1,000.00. The position of Underwood in that the bill of sale was executed merely as security to plaintiff for the money he owed him was not true there was indebtedness of an actual sale, but that it was understood that Underwood should deliver all the automobiles and then pay the plaintiff what he owed him; that the three automobiles mentioned were never delivered to plaintiff and were already sold by Underwood and he being in financial difficulties did not pay the plaintiff; that he paid the car in question on July 22 to the defendant for $600 [illegible] of his to the defendant as this time.

It further appears from the evidence that afterwards plaintiff became ill and was taken to a hospital where he was confined for several weeks. It testified that when he was at the hospital he first learned that Underwood had sold the car in question; that upon leaving the hospital he endeavored to secure the car but being unable to do so and having learned that it had been sold to defendant, he brought this action of replevin.

It is conceded that plaintiff made no demand on the defendant for the automobile before suing out the writ of replevin, and it is plaintiff's contention that the trial judge erred in not giving his requested instruction on the law required, while the position of the defendant appears to be that the court entered a judgment in his favor for the reason that he believed there was no sale by Underwood to the plaintiff of the automobile, but that the bill of sale was executed merely as security for the money which Underwood owed plaintiff.

We have reviewed the entire record in this case and

while the trial judge was not requested to find any facts, as the statute permitted, yet we think upon a consideration of the entire record we would not be warranted in saying the court decided the case on the legal proposition as contended for by plaintiff. The evidence discloses that Dombrowski had been borrowing money from time to time from the plaintiff to purchase second-hand machines; that a few days after June 25, 1921, when the bill of sale was executed by Dombrowski for the three automobiles Dombrowski had the automobile in question and some parts of it were broken. He thereupon took it to a repairman named Meyer and the latter repaired it. Shortly thereafter Dombrowski had the automobile painted and it was then placed outside Meyer's establishment with a "for sale" sign on it. About a week thereafter the defendant saw it and bought it from Meyer as agent for Dombrowski. Plaintiff testified that when the bill of sale was executed he surrendered up the $1,000.00 note to Dombrowski. This is denied by Dombrowski and he testified that he still owed plaintiff $1,000.00. Afterwards it appears that the defendant had Dombrowski arrested apparently on account of the sale of the automobile in question. No explanation is made why the bill of sale recites a consideration of $1875.00 paid by plaintiff for the three cars to Dombrowski when plaintiff testifies that Dombrowski owed him but $1,000.00 and that he surrendered up the note in payment of the car.

The evidence is very confusing and there is a direct conflict between the witnesses as to whether the three automobiles were actually sold to plaintiff by Dombrowski or whether the bill of sale was merely security for the indebtedness which Dombrowski owed the plaintiff. Upon a careful consideration of all the evidence we think we would not be warranted in saying

while the trial judge was not required to find any fraud, as the statute provides, yet we think upon a consideration of the entire record we would not be warranted in saying the court doubted the case on the legal proposition as contended for by plaintiff. The evidence tending to show Dombrowski had been borrowing money from time to time from the plaintiff to purchase motor-head machinery; that a few days after June 12, 1922, when the bill of sale was executed by Dombrowski for the same automobile Dombrowski had the automobile in question and some parts of it were broken. He thereupon took it to a repair-man named Dyer and the latter repaired it. Shortly thereafter Dombrowski had the automobile painted and it was then placed outside Moyer's establishment with a "for sale" sign on it. About a week thereafter the defendant saw it and bought it from Dyer as agent for Dombrowski. Plaintiff testified that upon the bill of sale was executed he surrendered up the $1,000.00 note to Dombrowski. This is denied by Dombrowski and he testified that that he still owed plaintiff $4,000.00. Otherwise it appears that the defendant had Dombrowski arrested repeatedly on account of the sale of the automobile in question. To explanation is made why the bill of sale recites a consideration of $1272.00 paid by plaintiff for the three cars to Dombrowski when plaintiff testifies that Dombrowski owed him but $1,000.00 and that he surrendered up the note in payment of the car.

The evidence is very conflicting and there is a direct conflict between the witnesses as to whether the three automobiles were actually sold to plaintiff by Dombrowski at the time the bill of sale was merely executed for the indebtedness which Dombrowski owed the plaintiff. Upon a careful consideration of all the evidence we think we would not be warranted in saying

that the finding of the court, as we assume he found, that there was no sale of the automobile is against the manifest weight of the evidence. In these circumstances, the judgment must be affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR J. CONCUR.

Opinion filed June 20, 1923

320 - 27796

THEODORE WEISS,

Appellee,

v.

LILLIAN PRINGLE and
AGNES PRINGLE,

Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Plaintiff brought an action of forcible detainer against the defendants to recover possession of an apartment in a building located at 2342 Calumet avenue, Chicago. The trial was before the court without a jury and there was a finding and judgment in plaintiff's favor, and this appeal followed.

The defendants occupied the premises by virtue of a written lease executed by the owner of the property and the defendant Lillian Pringle, the period covered being "from the first day of October, A. D. 1920, to the 30th day of Sept., 1921." Paragraph 15 of the lease is as follows: "That said lessee will give said lessor written notice, sixty days prior to the expiration of this lease, or any extension thereof, of his intention to vacate said premises or renew this lease, and a failure of lessee to give such notice, shall operate as a renewal of the tenancy for the further period of one year, at the option of the lessor." On August 1, 1921, a written notice was served on the tenant by tacking same on the apartment door, the tenant apparently being absent from the city, which

Opinion filed June 21, 1921.

No. 17774.

[illegible],

Appellee,

v.

[illegible]

[illegible]

[illegible]

WILLIAM FRANCIS and
ANNIE FRANCIS,

Appellants.

MR. JUSTICE [illegible] delivered the opinion of the court.

Plaintiff brought an action of forcible detainer against the defendants to recover possession of an apartment in a building located at 3843 Dearborn avenue, Chicago. The trial was before the court without a jury and there was a finding and judgment in plaintiff's favor, and this appeal follows.

The defendants acquired the premises by virtue of a written lease executed by the owner of the property and the defendant William Francis, the period covered being "from the first day of October, A. D. 1920, to the 30th day of Sept., 1921." Paragraph 18 of the lease is as follows: "That said lease will give said lessor written notice, ninety days prior to the expiration of this lease, or any extension thereof, of the intention to vacate said premises or renew this lease, and a failure of lessee to give such notice, shall operate as a renewal of the tenancy for the further period of one year, at the option of the lessor." On August 1, 1921, a written notice was served on the tenant by tacking same on the apartment door, the tenant apparently being absent from the city, which

was to the effect that the lease would terminate September 30, 1921. This notice further stated: "This notice is given pursuant to the provisions of a sixty day notice in said lease contained, and shall not operate as a waiver by lessor of any other provision therein contained."

The lessee, Lillian Pringle, did not testify, but her mother who was living in the apartment did. Her testimony was to the effect that she had never seen the 60 day notice nor a copy of it; that on August 1 her daughter, the lessee Lillian Pringle, left for Michigan; that on September 14, 1921, they received a letter and a copy of a new lease from the new landlord, the property having apparently been sold in the meantime, and that this was the first information they had that the property was sold or that it was the intention to increase the rent. She further testified that in the first week of June, 1920, she had a conversation with the owner of the premises over the telephone wherein she stated that it was their intention to remain in the premises.

1. The defendants contend that the 60 day notice tacked on the door of the apartment by the landlord was not a compliance with paragraph 15 of the lease, above quoted, and that by the terms of that provision personal notice was required to be given the tenant. This contention is clearly untenable. It does not require the landlord to give any notice, certainly not a 60 day notice. The provision is to the effect that if the tenant intends to vacate the premises at the end of the term prescribed in the lease, she should give the landlord 60 days' notice of such intention, and she could then vacate the premises at the end of the period mentioned in the lease. If she does not give the landlord such notice, the landlord

was to the effect that the lease was a perpetual renewable one, 99, 1921. This notice further stated: "This notice is given pursuant to the provisions of a plan duly noted in said lands registered, and shall not operate as a waiver by lessor of any other provisions thereof contained."

The lessee, Lillian Pringle, did not benefit, but her mother who was living in the apartment did. Her testimony was to the effect that she had never seen the 99 day notice nor a copy of it; that on August 3 her daughter, the lessee Lillian Pringle, left for Winnipeg, that in December, 1927, they received a letter and a copy of a new lease from the new landlord, the petitioner, requiring arrears paid in the meantime, and that that was the first intimation they had that the property was sold or that it was the intention to increase the rent. The further evidence that in the first week of June, 1928, she had a conversation with the owner of the premises over the telephone wherein she stated that she was their intention to remain in the premises.

5. The defendants evidence that the 99 day notice taken on the door of the premises by the landlord was not a compliance with paragraph 12 of the lease, above quoted, and that by the terms of that paragraph personal notice was required to be given the tenant. This proposition is clearly unsound. It does not require the landlord to give any notice, certainly not a 99 day notice. The provision is to the effect that if the tenant intends to vacate the premises at the end of the term prescribed in the lease, she should give the landlord 99 days' notice of such intention, and the evidence that she gave the premises at the end of the yearly tenancy in the lease. If she did not give notice, the landlord

may hold her another year if he sees fit to do so. If he does not see fit to do so, the lease is terminated by its own limitation, and no notice is required. Sec. 12, Ch. 80, Cahill's R.S. It is admitted that on September 14 defendant was informed that she could not have the apartment under the old lease for another year. If any notice was required to be given by the landlord in this respect, we think this was sufficient. It was given fifteen days before the termination of the period covered by the lease, and we think such notice was reasonable if any was required, which we do not decide.

It is obvious that it cannot be said that the lease was extended for another year by virtue of the telephone conversation which took place in June. Such an agreement, if one were made, would be void under the Statute of Frauds. But we think the testimony is far from sufficient to show any agreement in this respect.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

THOMSON, P.J. AND TAYLOR, J. CONCUR.

may hold her another year if he sees fit to do so. If he does not see fit to do so, the lease is terminated by its own limitations, and no notice is required. See, Sc. Ad. Lands's K.S. It is admitted that on November 14 defendant was informed that she could not have the government under the old lease for another year. If any notice was required to be given by the landlord in this respect, we think this was sufficient. It was eleven fifteen days before the termination of the period covered by the lease, and we think such notice was reasonable if any was required, which we do not decide.

It is claimed that it would be said that the lease was extended for another year by virtue of the subsequent conversation which took place in June. Such an agreement, if one were made, would be void under the statute of frauds. But we think the testimony in the Court sufficient to sustain our opinion in this respect.

The judgment of the Municipal Court of Toronto is affirmed.

-:O:-

THOMSON, J.A., AND ZAVITZ, J. CONCUR.

167 - 27643

C. W. BRAITHWAITE CO., a corporation, for the use of STANLEY ROGERS CO., a corporation, Appellee, v. EDWARD LASHAM COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

Opinion filed June 20, 1923.

MR. JUSTICE TAYLOR delivered the opinion of the court.

The plaintiff, C. W. Braithwaite Company, claiming that the defendant as a common carrier had received 19 bales of cloth from Stanley Rogers Company, to be delivered to the plaintiff and had failed to make the delivery, brought suit against the defendant and recovered a judgment - pursuant to a directed verdict - in the sum of $2361.49. From that judgment this appeal is taken.

The evidence shows substantially the following:-

The defendant, The Lasham Company, is an Illinois corporation in the business of general teaming, holding itself out to do teaming, carting and delivering for hire. It had about 40 horse drawn vehicles and 14 automobile trucks, and employed from 50 to 60 men in its business. From time to time the defendant had made deliveries of merchandise for the plaintiff. On April 12, 1920, one Fred Sandelback, a wagon dispatcher for the defendant company, received an order from the plaintiff to send over a single wagon to 618 South Canal Street, the place of business of the plaintiff. As the result of that order

D. E. MANUFACTURING CO., a corporation, also, for the use of DALLAS DOUGLAS CO., a corporation,	
Appellee,	
v.	
EDWARD ELLIOTT CONCRETE, a corporation,	
Appellant.	

Opinion filed June 20, 1963.

MR. JUSTICE DAVIDS delivered the opinion of the court.

The plaintiff, D. E. Manufacturing Company, alleging that the defendant in a common carrier had received 10 bales of plastic from Plastic Supply Company, to be delivered to the plaintiff upon her failing to make the delivery, brought suit against the defendant and recovered a judgment - pursuant to a directed verdict - in the sum of $2400.00. From that judgment this appeal is taken.

The evidence came substantially the following:

The defendant, The Lamar Company, is an Illinois corporation in the business of general hauling, making itself out to do hauling, moving and delivering for hire. It has about 60 horse drawn vehicles and 14 automobile trucks, and employed from 60 to 80 men in its business. From time to time the defendant has made deliveries of merchandise for the plaintiff. On April 12, 1960, Joe Ted Hendricks, a truck driver for the defendant company, received an order from the plaintiff to haul over a single route to 610 South Canal street, the place of business of the plaintiff. On the result of that order

one Sam Bruss, a teamster for the defendant company, took a wagon and drove over to the place of business of the plaintiff and was told by Braithwaite of the plaintiff company to drive over to Stanley Rogers Company on Jackson Boulevard and pick up a load for him and take it back to him, Braithwaite at 618 South Canal Street. At that time Braithwaite gave to Bruss a written order dated April 12, 1920, and directed to Stanley Rogers Company, 1019 West Jackson Boulevard for a certain lot of cloth. Sam Bruss then drove over to Stanley Rogers Company and received 19 bales of unboxed woolens or cloth for which he signed a receipt dated April 12, 1920, which receipt recites certain specific yards of cloth together with what purports to be the total cost which was set down at $2361.49. Bruss then undertook to drive back to the plaintiff's place of business but when he got to Desplaines and Harrison streets he was held up and after driving some distance under duress the wagon was stopped and the contents stolen. Sam Bruss was about 19 years of age at the time and was considered by the defendant as a trustworthy employee. There is some evidence on behalf of the defendant that Braithwaite on the day in question merely called for a wagon and that the defendant sent over a wagon with a driver to the plaintiff's place of business. Evidence on that subject was offered apparently in an effort to show that the defendant sent over the horse and wagon together with the driver, and did not assume any responsibility. The evidence on that subject, however, is so feeble as to be entirely negligible.

On the subject of damages the evidence is substantially as follows:- One Seegert, a stock clerk and bookkeeper for Stanley Rogers Company, testified that he took care of the records pertaining to stock received, to stock sent out, checked

was the house, a haunted for the [illegible] company, had a wagon and drove over to the place of business of the plaintiff and was told by Kerlikowsky of the plaintiff company to drive over to Stanley Rogers Tourney on Jackson Boulevard and pick up a load for him and take it over to him, Stanley Rogers at 232 South Canal Street. At that time Kerlikowsky gave to Green a written order dated April 12, 1926, and directed to Stanley Rogers Company, 232 West Jackson Boulevard for a certain lot of clothing. The Green then drove over to Stanley Rogers Company and received 13 bales of unknown weight or cloth for which he signed a receipt dated April 12, 1926, which receipt recited certain quantities of cloth together with what purports to be the total cost which was not less at $2,000.00. Green then returned to drive back to the plaintiff's place of business but when he got to Jackson and Western avenue he was held up and after driving some distance with defendant Kerlikowsky and the unknown robbers. The Green was about 18 years of age at the time and was overpowered by the defendant in a threatening manner. There is some evidence on behalf of the defendant that Kerlikowsky on the day in question merely asked for a ride and that the defendant took over a wagon with a driver to the plaintiff's place of business. Believing on that subject was effectively supported in an effort to show that the defendant took over the horse and wagon together with the driver, and did not assume any responsibility. The evidence on this subject, however, is so [illegible] as to be entirely meaningless.

In the matter of showing the evidence is substantially as follows:- Don Dougert, a black male and bookkeeper for Stanley Rogers Company, testified that to the best of his knowledge parties to whom received, to wit: 13, bales

and paid all invoices. He was shown an itemized statement of the merchandise which Brusa undertook to take over to Braithwaite and was asked if he was familiar with the cost of those goods and he answered that he was. When asked if he was familiar with the price of the goods "the reasonable market value of woolens of the character described " in plaintiff's exhibit 3, which was a list of them, he answered, yes sir. Objection was made that he was not properly qualified and that was sustained. He was then asked if he was familiar with the price of woolens in Chicago, April, 1920, and he answered that, he was. And, further, "what was the reasonable market value of that lot of goods described in plaintiff's exhibit 3 which were delivered by Sam Brusa to Edward Lasham" and he answered, "The price that I marked on here." He then stated that the total was $2361.49. Then he was asked - after intimating that that was the price in the East - if the price in Chicago would be higher to the extent of the transportation charges, and he answered, yes. He was then further asked, "In other words, in addition to the price there, there would have to be added the freight and cartage charges, and that would be the reasonable price of the goods in Chicago at that time?" to which he answered, "Yes sir." Still further, when, having stated that he was familiar with the value of the goods mentioned in plaintiff's exhibit 3, in Chicago, in April, 1920, he was asked what was their value in Chicago, he answered that he had figured it up and that it was $2361.49. No evidence was introduced on behalf of the defendant on the subject of damages.

It is contended on behalf of the defendant (1) that the evidence failed to show that it was a common carrier; (2) that the evidence failed to show the damages that were assessed against the defendant; (3) that both matters should have been submitted

and pain all involves. He was given an instead assessment of the antecedents which Jones undertook to take over to Smallbridge and was asked if he was familiar with the work of those people and he answered that he was. Then asked if he was familiar with the price of his goods "the reasonable market value of washers of the wholesale quantities" in Plaintiff's exhibit 3, which was a list of them, he answered, yes sir. Objection was made that he was not competent qualified and that was some taken. He was investigated if he had familiar with the price of washers in Chicago, April, 1948, and he answered that, he was. And, further, "what was the reasonable market value of that lot of goods involved in Plaintiff's exhibit 3 when sent delivered by you from Jones Lumber" was he answered, "The price that I marked on them." He then stated that the price was $[illegible]. Then he was asked - after indicating that that was the price in the book - if the price in Chicago would be higher in the years of the transportation charges, and he answered, yes. He was then further asked, "In other words, in addition to the price shown, there would have to be added the freight and cartage charges, and that would be the reasonable value of the goods in Chicago at that time?" to which he answered, "Yes sir." Still further, when, having stated that he was familiar with the value of the goods mentioned in Plaintiff's exhibit 3, in Chicago, in April, 1948, he was asked what was their value in Chicago, he answered that he had figured it up and that it was $[illegible]. He evidence was introduced on behalf of the defendant on the subject of damages.

It is recommended on appeal on the defendant (1) that the evidence failed to show that it was a normal military; (2) that the evidence failed to show the damages that were suffered resulting the defendant; (3) that the matters should have been submitted

to the jury for its determination.

(1) It is difficult to understand how it may reasonably be urged that the defendant was only a private carrier. The evidence shows that the defendant was in the general teaming business, using about 40 horse drawn vehicles and 14 automobile trucks and employed from 50 to 60 men in its business of receiving and making deliveries of merchandise throughout the city generally. Sandelback, a wagon dispatcher for the defendant company, stated that if anybody called for a wagon it would be sent and that on the day in question Braithwaite called for a single wagon and he sent over a wagon and driver to Braithwaite's place of business, and that he gave a slip to the driver and told him to do whatever Braithwaite instructed him to do. When asked the question, "This same man, Brusa sitting here, whose name appears on this plaintiff's exhibit 3 was in your employ at that time and he is the man you sent over to get these goods," Sandelback answered, "yes sir." The evidence, therefore, shows that Brusa, a driver for the defendant went over to Braithwaite's and was given an order to go to Lasham's and get some goods and take them back to Braithwaite's place of business and that that was done and evidently for compensation. Such conduct was that of a common carrier. It is the law that one who makes a business of carrying goods for profit is a common carrier and liable (save as to acts of God and the common enemy,) for non delivery.

In Hinchliffe v. Wenig Teaming Co., 274 Ill. 417, the court said, "While it has sometimes been doubted whether cartmen or truckmen employed to carry goods from one part of the city to another are to be listed as common carriers, it is a general rule that when they undertake to carry goods for hire for the public generally and as a common

4. The Jury Was Misinstructed

(1) It is difficult to understand how it may reasonably be argued that the statements are only a mistaken opinion. The evidence shows that the defendant was in the personal insolvency case, using about it never clear relative and is apparently trying and employed from 20 to 30 men in the business of remodeling and making motorcycles of overwhelming importance the city economically. Equipment, a major disposition for the defendant company, stated that if anybody motion for a repair it would be very, very expensive. The jury is possibly justifiably willing for a minute motion and be most over a right not giving to Brainchild's claim of warranty, and that he gave a call to the driver and left him to do whatever Brainchild instructed him to do. Then when the crashing, "this came man, Brown driving here, moves come dynamo on our direction." Brainchild's conflict 3 was in your moving at case time and be in the man you meet over to get trade group." Brainchild answered, "you sir." The evidence, therefore, where that there, a driver for the defendant went over to Brainchild's and was given an order to go to London's and get some goods and take them back to Brainchild's place of business and that this was done not principally for accommodation. Such conduct was that of a reasonable person. It is the law that can the value a business of carrying goods for profit is a common carrier for hire (even as is more of and in the common sense) for the returns.

In Brownlie v. Grand Trunk Co., 29 D.L.R. 147, the court said, "While it was conceded that defendant carriers business of transmission engaged in carry goods from one part of the city to another are to be listed as common carriers, it is a general rule that the moderate to carry goods for hire for the public generally not a common

employment in the city they are common carriers." City of Chicago v. Sayer, 290 Ill. 142. We think the evidence amply demonstrates that the defendant was a common carrier.

(2) As to the plaintiff's damages. The only evidence on that subject outside of plaintiff's exhibit 3, which purported to contain the number of yards, cost per yard and the total cost, which exhibit was signed by Sam Brusa for the defendant, is the testimony of Seegert, an employee of Stanley Rogers. Seegert testified that he was familiar with the price of woolens in Chicago in April, 1920, and that the reasonable market value of the goods described in plaintiff's exhibit 3, which were delivered by Edward Lasham to Sam Brusa, was the price which he had marked down and which totaled $2361.49. He was asked various questions concerning the price and value of the goods and finally stated that he was familiar with the value of the goods mentioned in plaintiff's exhibit 3 in Chicago in April, 1920, and that it was $2361.49.

As said above, no evidence on the subject of damages was introduced on behalf of the defendant. It is our judgment that the evidence that was introduced made out a prima facie case, as to damages, to the extent of $2361.49.

(3) Did the court err in instructing the jury to find a verdict for the plaintiff? As we do not find that there was any material conflict in the evidence and feel that all reasonable minds would come to the same conclusion, ~~therefore~~, in our judgment it then became purely a question of law whether on the facts the plaintiff was entitled to a verdict. And as to that, we are of the opinion that the evidence fully justified the instruction of the trial judge. Anthony v. Wheeler, 430 Ill.138;

engineers in the city who were common carriers." City of Chicago v. Byers, 880 Ill. 148. We think the evidence amply demonstrates that the defendant was a common carrier.

(3) As to the plaintiff's damages. The only evidence as that subject consists of plaintiff's exhibit 3, which purported to contain the amount of payroll, work put upon and the total cost, which exhibit was signed by the firm for the defendant, in the capacity of bookkeeper, or keeper of timekeep [illegible]. Assuming therefore that as was familiar with the price of workmen in Chicago in April, 1880, and that the testimony proves value of the goods described in plaintiff's exhibits 3, which were [illegible] by Edward Lenhan to the firm, and the price which he had earned [illegible] and which totaled $2000.00. It was error [illegible] excluding the offer and value of the goods and finally stated that he was familiar with the value of the goods mentioned in plaintiff's exhibit 3 in Chicago in April, 1880, and that it was $2000.00.

As said above, the evidence as to the amount of damages was introduced on behalf of the defendant. It is the judgment that the evidence that was introduced [illegible] a prima facie case, as to damages, in the amount of $2000.00.

(4) Did the court err in instructing the jury as [illegible] a verdict for the plaintiff? We do not find that there was any material conflict in the evidence and that all reasonable minds would come to the same conclusion. xxxxxxxx, in our judgment it was proper during a question of law [illegible] on the fact the plaintiff was entitled to a verdict. And so we [illegible] of the opinion that the defendant fully justified the [illegible] of the trial judge. Judgment v. Quinlan, 88 Ill.1847

Marshall v. Grosse Clothing Co., 184 Ill. 421; Davidson v. Zerger, 181 Ill. App. 113; Rock v. Chicago City Railway Co., 173 Ill. 289.

The judgment will, therefore, be affirmed.

AFFIRMED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

[illegible] v. [illegible], 180 [illegible], [illegible] [illegible] v. [illegible], 140 [illegible], [illegible] [illegible] v. [illegible], 179 [illegible], [illegible].

The [illegible], [illegible], [illegible] [illegible].

[illegible], [illegible], [illegible] [illegible].

317 - 27793

Opinion filed June 20, 1923.

(32524)

ISAAC WEISBERG and
EDA WEISBERG,

Appellees,

v.

OTTO MOESING,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

MR. JUSTICE TAYLOR delivered the opinion of the court.

On October 3, 1921, Isaac and Eda Weisberg, as plaintiffs, brought suit in forcible detainer against the defendant, Otto Moesing, claiming that the defendant unlawfully withheld possession of a three story brick residence known as 517 Arlington Place, Chicago. There was a trial by a jury, an instructed verdict, and judgment thereon in favor of the plaintiffs. From that judgment this appeal was taken.

The evidence shows substantially the following: The property originally was owned by the Matson estate; the heirs of the estate were Frederick R. Matson, Isabella Matson Hoffman, Gertrude Matson Kelly and C. R. Matson. One Wm. F. Kelly was the agent of the Matson estate and had charge of the property in question and collected all the rents of the propsty. On May 1, 1919, "Wm. T. Kelly, Agent." signed a lease to Otto Moesing, the defendant, of the premises in question, for five years ending April 30, 1924, for $40.00 a month. The lease was signed "Wm. T. Kelly, Agt. Otto Moesing." and that lease was offered in evidence, objected to, and the objection sustained.

347 - 47713 Opinion filed June 20, 1932.

ISAAC MILKENTON and ADA MILKENTON, Appellees, v. ALVIN DOUGLAS, Appellant.	ABSTRACT OPIN WRITTEN COURT OF APPEALS.

MR. JUSTICE LARSON delivered the opinion of the court.

On October 3, 1931, Isaac and Ada Milkenton, as plaintiffs, brought suit in Cook County against Alvin Douglas, defendant, alleging that the plaintiffs unlawfully withheld possession of a three story brick residence known as 627 Arlington Place, Chicago. There was a trial by a jury, an interested verdict, and judgment thereon in favor of the plaintiffs. From that judgment this appeal was taken.

The evidence shows substantially the following: The property originally was owned by the Hudson estate; the heirs at its estate were Frederick H. Hudson, Isabelle Hudson Gibson, Catherine Hudson Kelly and L. E. Gibson. One Wm. T. Kelly was the agent of the Hudson estate and had charge of the property in question and collected all the rents of the property. On May 1, 1930, "Wm. T. Kelly, Agent," signed a lease to Otto Downing, the defendant, of the premises in question, for five years ending April 30, 1935, the rental a week. The lease was signed "Wm. T. Kelly, Agt. Eth Hudson." and that lease was offered in evidence, objected to, and the objection sustained.

Counsel for the plaintiffs made the following statement in the course of the trial, "We will agree that prior to the sale by Mrs. McNellis the Matson estate was the owner of the property; and that the lease was made by Mr. Kelly, a son-in-law of Matson." Otto Moesing, the defendant, went into possession of the house under that lease on May 1, 1919, and lived there thereafter paying rent at the rate of $40.00 a month. Subsequently the property was sold by the Matson heirs to one Mrs. McNellis, and then by her to the plaintiffs.

There was offered in evidence a written contract of purchase whereby Isaac Weisberg agreed to purchase the premises in question for $11,000.00 and Elizabeth McNellis agreed to sell the same to him for that price. That contract provided, among other things, that it was subject to "existing leases expiring April 30, 1924, on residences" etc. That document was offered in evidence on behalf of the defendant, objected to by counsel for the plaintiffs and the objection sustained.

The plaintiff, Isaac Weisberg, testified that he bought the property in 1920 from Elizabeth McNellis; that he was told at the time that there was a lease; that at the time he bought the property he knew the defendant, Moesing, was in possession; that the defendant has paid the rent, $40.00 a month, ever since with the exception of the months of September and October, 1921; that for those months the defendant sent him checks for the rent, but he sent them back.

Kelly, who signed the lease of May 1, 1919, testified that he was then acting as agent for the Matson estate, his wife being one of the heirs; that he collected the rents from the building and that he had a written power of attorney from the heirs; that he was unable to find the written power of attor-

Counsel for the plaintiffs made the following statement in the course of the trial, "We will agree that prior to the sale by Ida, Matilda, the defendant, was the owner of the property; and that the lease was made by M. Sally, a non-in-law of Ida." (Tr. 3 [illegible]). The defendant, Ida [illegible] possession of the house under that lease on May 1, 1938, and [illegible] therefor paying rent at the rate of $40.00 a month. Subsequently the property was sold by the sheriff to the [illegible], and then by her to the plaintiffs.

There was offered in evidence a written contract of purchase whereby Ida [illegible] agreed to surrender the premises in question for $11,000.00 and Elizabeth McMillin agreed to sell the same to Ida for that price. [illegible] provided, among other things, that it was subject to "existing leases [illegible] April 30, 1934, on residence" etc. This document was offered in evidence on behalf of the defendant, objected to by counsel for the plaintiffs and [illegible].

The plaintiff, James Pointer, testified that he bought the property in 1938 from Elizabeth McMillin; that he was told at the time that someone [illegible]; that up to the time he bought the property he knew the defendant, Ida, was in possession; that for [illegible] he paid her $40.00 a month, and [illegible] with the exception of the months of September and October, 1941; that for those months the defendant [illegible] for the rent, but he was [illegible].

Early, [illegible] of July 1, 1941, testified that he was then acting as agent for the Union Trust, his wife being one of the heirs; that he delivered the [illegible] building and that he had a written power of attorney from the heirs; that he was unable to find the written power of attor-

ney although he had searched for it; that the power of attorney which he had was signed by all the heirs of the Matson estate and was dated June 1, 1914, and was in his possession at the time he signed the lease of May 1, 1919; that although he searched for it he could not say whether it is now in existence or not. One of the heirs of the Matson estate, Mrs. Hoffman, testified that a power of attorney was given to her brother-in-law, Kelly, to act for the heirs; to take charge of the property, rent it, and collect the rents.

On the back of the lease, dated May 1, 1919, by Wm. T. Kelly, Agent, to Otto Moesing, the defendant, there is a written assignment in the following words, "For and in consideration of one ($1.00) dollar to me in hand paid I hereby assign, transfer and set over to Isaac Weisberg and Ida Weisberg all my right, title and interest in the within lease. Witness my hand and seal this 3rd day of April, 1920. H. McNellis."

Isaac Weisberg testified that he had a duplicate of the Kelly Moesing lease; that he never saw the assignment on the back; that he received the assignment after the deal was closed inApril, 1920. He further tstified, however, that Mrs. McNellis deeded the property to him and the real estate brokers gave him the lease; that the assignment on the back is signed by her and was delivered to him. And when asked, "And accepted by you?" he answered, "Yes sir." He also testified that he knew it was rented; that he had been in the property before it was bought and knew that the Moesings were in possession.

From the time the plaintiffs purchased the property, early in 1920, until September the same year, they received rent from the defendant at the rate of $40.00 per month as pre-

May although he had neglected for 33; that the power of attorney which he had was signed by all the heirs of the Watson estate and was dated June 1, 1924, was one in the possession of the time he signed the lease on May 1, 1933; that although he searched he could not say whether it is one in existence or not. One of the heirs of the Watson estate, Mr. Hoffman, testified that a power of attorney was given to her brother-in-law, Kelly, to act for the heirs; to take charge of the property, rent it, and collect the rents.

On the head of the lease, dated May 1, 1933, by Mr. E. Kelly, Agent, to Otto Lessing, the defendant, there is a written assignment in the following wise, "For and in consideration of one ($3.00) dollar to me in hand paid I hereby assign, transfer and set over to Lance Reisberg and Ida Weinberg all my right, title and interest in the within lease. Witness my hand and seal this 3rd day of April, 1934. E. Hoffmann."

Lance Reisberg testified that he had a duplicate of the Kelly Housing lease; that he never saw the assignment on the back; that he received the assignment after the deal was almost signed, 1934. Mr Fulton testified, however, that Mr. McCallie handed the property to him and the real estate brokers gave him the lease; that the assignment on the back is signed by her and was delivered to him. And when asked, "And accepted by you?" he answered, "Yes sir." He also testified that he knew it was rented; that it had been in the property before it was bought and knew that the dwellings were in possession.

Then the line for plaintiff's purchase the property, early in 1935, until September the same year, they received rent from the defendant at the rate of $40.00 per month as pro-

scribed by the lease in question. Altogether the defendant had occupied the premises under the lease for about 16 months of the 60 contracted for, and had paid 16/60 of the total consideration which in the lease was the fixed sum of $2400.00.

On June 28, 1921, the plaintiff, Isaac Weisberg, served written notice on the defendant, Otto Koesing, notifying him that his tenancy would terminate on August 31, 1921. The notice was signed by both plaintiffs.

The trial judge, on the theory that the lease of May 1, 1919, was made by "W. T. Kelly, Agent." and in no way on its face bound the Matson heirs, concluded it was incompetent as evidence and, that the plaintiffs were entitled, therefore, to possession. The trial judge was also of the opinion that as there was no evidence that the written authority, which Kelly testified he had lost, was under seal, the alleged lease of May 1, 1919, was no defense. It is contended on behalf of the plaintiff that the evidence failed to show that the lease of May 1, 1919, was binding on the Matson estate; that it only purports to be by one "Kelly, Agent", and was, therefore, properly ruled out as incompetent evidence. On the other hand, on behalf of the defendant it is claimed that the lease was binding was made by one having authority and was carried out to such an extent by the lessee in taking possession and paying rent over a long period of time that it was binding not only on the Matson heirs but on Mrs. McNellis and on her grantees, the present plaintiffs, and should have been admitted in evidence.

Kelly testified he had written authority from all the heirs and that the lease was executed by him as agent for them, and some of the heirs testified that they knew of the lease and also that Kelly had authority.

certified by the lessee in question. Although the defendant had acquired the premises under the lease for about 12 months of the 60 contracted for, and had paid 12/60 of the total consideration which in the lease was the fixed sum of $[illegible].00.

On June 22, 1922, the plaintiff, lessee designate, executed written notice to the defendant, the decedent, notifying him that his tenancy would terminate on August 31, 1922. The notice was signed by the plaintiff.

The trial judge, on the theory that the lease of May 1, 1919, was made by "G. T. Kelly, Agent," and in no way on its face bound the Kansas heirs, concluded it was incompetent as evidence and, that the plaintiffs were entitled, therefore, to possession. The trial judge was also of the opinion that no more was an witness that the written authority, which Kelly testified he had lost, was under seal, the minutes lease of May 1, 1919, was no defense. It is contended on behalf of the plaintiff that the evidence fails to show that the lease of May 1, 1919, was binding on the Kansas estate; that it only purports to be by one "Kelly, Agent", and was, therefore, properly ruled out as incompetent evidence. On the other hand, on behalf of the defendant it is claimed that the lease was binding and made by one having authority and was carried out by and on behalf by the lessee in taking possession and paying rent year a long period of time that it was binding not only on the Kansas heirs but on Kansas and on her grantees, the present plaintiffs, and should have been admitted in evidence.

Kelly testified he had written authority from all the heirs and that the lease was executed by him as agent for them, and none of the heirs testified that they knew of the lease and also that Kelly had authority.

There seems to be no doubt but that the lease would have been a good defense by the defendant if he had been sued by the Matson heirs for possession before they sold to Mrs. McNellis. The question then arises, does it follow that the plaintiffs herein, having knowledge at the time they bought the property of the defendant's possession under the lease from "Kelly, Agent.", and having contracted in writing when negotiating to purchase the property that they took it "subject to existing leases expiring April 30, 1924," which referred to the very lease in question, are now estopped from disputing the tenancy or right to possession of the defendant? No question as to the statute of frauds arises; it was not mentioned in the complaint nor does it appear as having arisen at the trial. As it nowhere affirmatively appears that the authority of Kelly was not evidenced by writing, duly signed by the owner or owners, the statute of frauds does not become a defense. Butman v. Butman, 213 Ill. 104; Fowler v. Fowler, 204 Ill. 82. The plaintiffs are not now entitled upon review, the record being silent on that subject, to say that they have a right to possession simply because the defendant was in possession under a lease which might have been held to be void under the statute of frauds if it had been subjected to a judicial test on that subject. However, we are of the opinion that even if the plaintiffs had claimed on the trial that the defendant's lease was subject to the statute of frauds it would have been of no avail. The Matson heirs recognized Kelly was having authority and testified that he did have authority to lease and collect rents; they recognized the lease and the right of the tenant to possession, accepted rent, and Kelly testified he had a power of attorney authorizing him to lease, and the plaintiffs bought the property expressly subject to the lease in question.

There seems to be no doubt but that the Jones would have been a good defense by the defendant if he had been sued by the Matson Nelms for possession before they sold to Ira. McKillip. The question then arises, does it follow that the plaintiffs herein, having insofarse as the view they bought the property of the defendant's possession under the lease from "Nally, Agent.", and having undertaken to write when requesting to purchase the property that they took it "subject to existing leases covering Lot N. 1124," which referred to the very lease in question, are now estopped from alleging the homestead right to possession of the defendant? No question as to the effects of fraud arises, it has not entered in the case plaint nor does it appear on having arisen of the trial. In it remains affirmatively appears that the ownership of land was not evidenced by writing, only signed by the owner or owners, the statute of frauds does not become a defense. Nelms v. Jones, 214 Ill. 164; Joint v. Joint, 204 Ill. 84. The plaintiffs are not now writing upon review, the record being silent on that subject, so may that they have a right to presumption which because the defendant is possessing under a lease which might have been held to be void under the statute of frauds if it had been subjected to a judicial test on that subject. However, we are of the opinion that even if the plaintiffs had claimed on the point that the defendant's lease was subject to the statute of frauds it would have been of no avail. The Matson heirs recognized Nally was having authority and testified that he is the very authority to lease not sellers from; they recognized the lease and the right of the tenant in possession, accepted rent, and Nally portrayed to be a person of authority intervening him to Jones, and the plaintiffs sought the property expressly subject to the lease in question.

As said in Doubet v. Doubet, 180 Ill. App. 316, "A contract of leasing, void under the statute of frauds, may yet be carried out by the parties in interest and they are then bound thereby." Certainly the heirs of Watson were bound. The defendant had gone into possession under the "Kelly, Agent" lease and had paid rent for a number of months; the lease had, therefore, been executed by the tenant to that extent. The plaintiffs, here, got the property upon making a purchase burdened with the then existing rights of the defendant, in fact bought it using lanuage which showed that they recognized the lease and that they took the property subject thereto. It will, therefore, be seen that the lease, the assignment and the contract of purchase, all of which were proffered on behalf of the defendant and rejected by the court, were material and competent and should have been admitted in evidence. The judgment will, therefore, be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

THOMSON, P.J. AND O'CONNOR, J. CONCUR.

As said in Jones v. Jones, 180 Ill. App. 324, "A contract of leasing, with under the statute of frauds, may yet be varied out by the parties in interest and they are then bound thereby." Certainly the rules of nature were known. The defendants had made their presentation under the "Fifth" lease. Lease had had paid rent for a number of months; the lease had, therefore, been executed by the tenant to that extent. The plaintiff, here, got the property upon making a purchase burdened with the then existing rights of the defendant, in fact bought it using language which proved that they recognized the lease and that they took the property subject thereto. It will, therefore, be seen that the lease, the management and the contract of purchase, all of which were performed on behalf of the defendant and rejected by the court, were material and important and should have been admitted in evidence. The judgment will, therefore, be reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

HEBRON, P.J., AND O'CONNOR, J., CONCUR.

10 - 27945

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error, vs. ANDREW RYDER, Plaintiff in Error.	ERROR TO MUNICIPAL COURT OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff in error, Andrew Ryder, was convicted in the Municipal Court of Chicago of the crime of petit larceny. The court found the value of the property to be $8.25 and sentenced the defendant to the House of Correction for a term of one year and pay a fine of $100 and costs. No bill of exceptions has been preserved and the case is before us on the common law record.

It is urged that the information upon which the defendant was tried is defective. It charged that the plaintiff in error "on the 2d day of May, A. D. 1922, at the City of Chicago, in the said County of Cook, in the State of Illinois, aforesaid, unlawfully, wilfully and maliciously forced open a lock upon a certain scale located in front of 3148 South Halsted street, the scale then being the property of the said Oscar E. Wagner, and did steal, take and carry away U. S. currency of the value of eight dollars and twenty-five cents ($8.25) the personal goods and property of Oscar E. Wagner then and there being found, did then and there wrongfully and unlawfully take, steal, carry away, contrary to the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois." It is contended that this information is defective

PEOPLE OF THE STATE OF
ILLINOIS,
Defendant in error,

vs.

JACKSON WIGGS,
Plaintiff in error.

MR. PRESIDING JUSTICE DUNCAN
DELIVERED THE OPINION OF THE COURT.

The plaintiff in error, Jackson Wiggs, was convicted in the Municipal Court of Chicago of the crime of petit larceny. The court found the value of the property to be $8.00 and sentenced the defendant to the House of Correction for a term of one year and pay a fine of $200 and costs. No bill of exceptions has been preserved and the case is before us on the common law record.

It is urged that the information upon which the defendant was tried is defective. It charged that the plaintiff in error "on the 24 day of May, A. D. 1922, at the City of Chicago, in the said County of Cook, in the State of Illinois, aforesaid, unlawfully, wilfully and misdemeanorously force open a lock upon a certain house located in front of 2148 North Halsted street, the same then being the property of the said Oscar W. Wagner, and did steal, take and carry away U. S. currency of the value of eight dollars and twenty-five cents ($8.25) the personal goods and property of Oscar W. Wagner then and there being found, did then and there wrongfully and unlawfully take, steal, carry away, contrary to the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois." It is contended that this information is defective

because the denomination of the United States currency alleged to have been stolen was not particularly set forth. The record does not show any motion to quash the information, nor motion in arrest of judgment. There are a number of cases decided by this court and by the Supreme Court of this State tending to sustain the contention of plaintiff in error. People v. Hunt, 251 Ill. 446; People v. Miller, 178 Ill. App. 292; People v. Morgan, 194 Ill. App. 514; Williams et al. v. People, 101 Ill. 382; People ex rel. v. Whitman, 243 Ill. 471.

It is further true, as defendant contends, that where an information fails to charge a crime, although no motion to quash or in arrest of judgment was made, a writ of error will lie. Klawinski v. People, 218 Ill. 481; People v. Seiss, 168 Ill. App. 502.

Nevertheless, we think the point made cannot be sustained. In a recent case our Supreme Court has held that the crime of petit larceny is a statutory one in this state and not a common law offense, and that the particularity required in the information as to a crime at common law is not necessary in charging the statutory crime. The case to which we refer is People v. Cohen, 343 Ill. 523. For the reasons there stated in the opinion of the court, which it is unnecessary to repeat, but by which we are bound, the judgment is affirmed.

AFFIRMED.

Johnston and McSurely, JJ., concur.

because the incorporation of the United States currency alleged to have been stolen was not particularly set forth. The record does not show any motion to quash the information, nor motion in arrest of judgment. There are a number of cases decided by this court and by the Supreme Court of this state bearing on merits the construction of plaintiff in error. Brooks v. State, 20 Ill. App. 2d; Brooks v. Illinois, 176 Ill. App. 2d; Dowdy v. Brown, 144 Ill. App. 2d; Williams et al. v. People, 101 Ill. 2d; Dowdy et al. v. Williams, 241 Ill. App.

In Brooks case, in determining decisions, this court as an information fails to charge a crime, although no motion to quash or in arrest of judgment was made, a writ of error will lie. Lingenfelt v. People, 215 Ill. App.; Dowdy v. Dowdy, 172 Ill. App. 2d.

Nevertheless, we think the point made cannot be maintained. In a recent case our Supreme Court has held that the crime of petit larceny is a statutory one in this state and not a common law offense, and that the particularity required in the information as to a crime at common law is not necessary in charging the statutory crime. The case to which we refer is People v. Brown, 271 Ill. 2d. For the reasons there stated in the opinion of the court, which it is unnecessary to repeat, but by which we are bound, the judgment is affirmed.

AFFIRMED.

Jamison and Scanlan, JJ., concur.

235 - 28070

(3240)

HENRY KUNZ,
Appellee,

vs.

BOSTON STORE OF CHICAGO,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

Certiorari denied

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant corporation from a judgment in the sum of $12,000 entered upon the verdict of a jury in an action on the case for personal injuries, motions for a new trial and in arrest of judgment having been overruled. The cause has been tried three times. On the first trial the courtinstructed a verdict for the defendant and entered judgment thereon, which upon appeal to this court was reversed and the cause remanded. See Kunz v. Boston Store, 214 Ill. App. 154. Upon the second trial the jury returned a verdict for plaintiff in the sum of $10,000, which upon motion for a new trial was set aside by the court.

The defendant conducted a department store in the city of Chicago, and the injuries for which plaintiff sues were sustained while plaintiff was employed by the defendant working in and about this store September 23, 1915. The theory of the plaintiff is that the business conducted by the defendant was extra-hazardous and the provisions of the Workmen's Compensation Act were therefore applicable to defendant; and that it having elected (as it then had the right) not to be bound by the provisions of that law or pay compensation under the same, it was thereby deprived of the common law defenses of contributory negligence, fellow servant and assumed risk.

[illegible] - [illegible]

[illegible],
Appellee,

vs.

BOSTON STORE OF CHICAGO,
a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT

OF COOK COUNTY.

250 I.A. 663

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant corporation from a judgment in the sum of $[illegible] entered upon the verdict of a jury in an action on the case for personal injuries, motions for a new trial and in arrest of judgment having been overruled. The cause has been tried three times. On the first trial the court instructed a verdict for the defendant and entered judgment thereon, which upon appeal to this court was reversed and the cause remanded. See [illegible] v. Boston Store, [illegible] Ill. App. [illegible]. Upon the second trial the jury returned a verdict for plaintiff in the sum of $[illegible], which upon motion for a new trial was set aside by the court.

The defendant conducted a department store in the city of Chicago, and the injuries for which plaintiff sues were sustained while plaintiff was employed by the defendant working in and about this store September [illegible], 1925. The theory of the plaintiff is that the business conducted by the defendant was extra-hazardous and the provisions of the Workmen's Compensation Act were therefore applicable to defendant; and that it having elected (as it then had the right) not to be bound by the provisions of that law to pay compensation under the same, it was thereby deprived of the common law defenses of contributory negligence, fellow servant and assumed risk.

In support of the points argued the pleadings have considerable importance. The plaintiff's declaration consisted of the third, fourth and fifth additional counts. The third count alleged that at the time of the accident the defendant was in possession and control of a certain building at the intersection of State, Dearborn and Madison streets in Chicago, Illinois; that the building consisted of divers floors or stories and contained openings in the floors which constituted a well or shaft through and in which elevators moved up and down; that the defendant was using this building and the elevators and other machinery and appliances in conducting "a certain business or enterprise commonly known as a department store, which consisted in buying, selling and delivering divers kinds of goods, wares and merchandise."

It was further alleged that a portion of one of the floors of this building near and adjacent to the elevators was used as a storage and packing room, and that the merchandise carried by means of the elevators was stored and packed there for the purpose of being carried thence to divers purchasers thereof.

"Plaintiff further alleges that divers Statutory and Municipal ordinance requirements for protecting and safeguarding employees in the kind or class of business or enterprise in which the said defendant was then engaged in said building as aforesaid, have been and had then been imposed by the State of Illinois and the said City of Chicago; and that the said defendant was then and thereby engaged at said place and in said building in an enterprise in which Statutory and Municipal ordinance requirements have been imposed for the protection and safeguarding of defendant's employees therein."

This count also alleges that at that time defendant had duly elected not to provide and pay compensation to its employees

In support of his points regard the plaintiff has annexed[illegible] interviews. The plaintiff's testimonial evidence of the third, fourth and fifth additional remedies. The third remedy alleged that at the time of the seizure the defendant was in possession and control of a certain building on the transportation of goods, foodstuffs and business stores in Oshawa, claiming that the building consisted of dirty floors or stairs and contained dangers to the thereon which constituted a well or shaft through and in which elevators moved up and down; that the defendant was using this building and the elevators and other machinery and appliances in conducting "a notorious business or enterprise commonly known as a department store, which contained in toying, selling and delivering diverse kinds of goods, wares and merchandise."

It was further alleged that a portion of one of the floors of this building was not adjacent to the elevators and used as a storage and loading area, and that the warehousing carried by means of the elevators was absent and passed down for the purpose of being stored which is diverse warehousing thereof.

"Plaintiff further alleges that diverse statutory and Municipal ordinance regulations for construction and safeguarding employees in the kind or class of business or occupation in which the said defendant was then engaged in and building so aforesaid, have been and had been ignored by the Minister of Lighting and the Fire Marshal of Ontario and that the said defendant was then and thereby engaged at said place and in said building in an occupation in which Statutory and Municipal ordinance regulations have been ignored for the protection and safeguarding of defendant's employees thereon."

This account also alleges that at that time defendant had fully abided not to provide and pay compensation to its employees

for injuries arising out of and in the course of their employment, pursuant to the statute, and that the defendant had filed with the Industrial Board of Illinois a notice in writing of its election not to provide and pay compensation, and had posted a copy of said notice in conspicuous places in its store on the different floors of the building, and had furnished to the plaintiff a copy of the notice, pursuant to the statute in such case made and provided, and that the defendant was thereby not operating its business and enterprise under the Workmen's Compensation act. The count then sets up the employment of plaintiff in packing certain goods and preparing them for delivery and carriage by the defendant to its purchasers, and says that while he was engaged in the performance of his duties, pursuant to his employment and service, the defendant carelessly and negligently failed and neglected to furnish him a reasonably safe place to perform his duties, but on the contrary furnished him a place in the packing room near the elevators and near a place where the defendant had placed and stored and allowed to remain in an insecure and unstable position, large and heavy packages or rolls of merchandise of a material known as linoleum, having a length of 12 feet and a diameter of 2 feet and a weight of 300 pounds, so that said rolls or packages were then standing on one of the ends thereof and were insecurely leaning against a wall or other part of the building, and by reason of their insecure and unstable position were liable to fall and strike and injure any person who might be standing or walking near the same; that by reason thereof the place was dangerous as a place in which to stand and perform any work; that while the plaintiff was performing his duties, the rolls or packages of linoleum and other goods fell and struck the plaintiff with force and violence; that he was thereby thrown down onto the floor; that the rolls of linoleum fell on top of his body and injured him, etc.

The fourth count alleges the same facts as to the ownership of the building, employment, applicability of the Workmen's Compensation act and rejection of it, and says that the defendant carelessly and negligently caused certain of the rolls or packages of merchandise to be jolted, jarred, moved and disturbed, and by reason thereof the same fell and struck the plaintiff, injuring him.

The fifth count, after alleging the same facts as to possession of the building, employment, etc., asserts that the defendant carelessly and negligently placed in an insecure and unstable position certain large and heavy packages or rolls of merchandise or of linoleum, and that by reason of the negligent manner in which the rolls were placed and stationed, the same fell, striking the plaintiff and injuring him.

In the declaration before us on the former appeal each of the counts alleged that plaintiff's duties in the course of his employment consisted "in helping to remove from said elevators certain of said goods, which the defendant was causing to be sent to said packing room by means of said elevators, and plaintiff's further usual duties consisted in handling said goods after they reached said packing room as aforesaid." These words were upon the trial of the cause May 20, 1921, stricken out of the declaration by means of an amendment, which plaintiff filed upon leave of court. After this amendment was filed defendant filed a plea of not guilty to the declaration as amended and a further plea of the statute of limitations. To this last plea plaintiff filed a demurrer, which was sustained, and the defendant elected to stand by its plea.

Upon the issues as thus made up the cause was submitted to the jury, with the result heretofore stated.

At the conclusion of all the evidence the defendant

made a motion for an instruction in its favor, and argues in this court that for several reasons this instruction should have been given. It argues that because the Workmen's Compensation act was amended on July 1, 1915, and because that after that date and up to the time of the accident it filed no notice of an election not to provide and pay compensation under this act of 1915 as amended, therefore, in so far as its extra-hazardous occupations and employments were concerned it is presumed to have elected to pay compensation under the act, and that the plaintiff is thereby precluded from maintaining against it a common law action on account of his injuries.

The plaintiff urges on the contrary that this point has been waived by defendant because of its failure to urge the same on the former appeal. Kunz v. Boston Store, supra. Plaintiff insists that a party cannot on a second appeal take advantage of any error which existed and might have been assigned on the former record, and cites Ladd v. Ladd, 256 Ill. 103, and Norman Creek Drainage Dist. v. Rawley, 258 Ill. 34. He contends that the defendant is therefore precluded from raising any question on this appeal which was not urged by it on the former one. We think, however, the cases cited have no application to the facts which appear here. Upon the first trial the defendant was successful. The appeal to this court was by the plaintiff and the duty was on him to assign errors. The defendant was not complaining there of the judgment entered by the trial court, but was apparently satisfied with that judgment. We know of no rule of law by which an appellee in such a case must, at the peril of being precluded from urging the points on his future appeal, assign and argue errors upon a record with which he is wholly satisfied. The Supreme court has held directly contrary in City of Lincoln v. Marts, 270 Ill. 648, where a similar point was argued. The court said:

made a motion for an instruction in his favor, and excepts to this ruling thus for several reasons this instruction should have been given. It argues that because the Workmen's Compensation act was repealed on July 1, 1919, and because that date was long and up to the time of the accident it still is a matter of no effect not to provide and pay compensation under this act of 1913 is annulled, therefore, as to for as the extra-hazardous occupations and employments were concerned it is presumed to have elected to pay compensation under the act, and that the plaintiff is thereby precluded from maintaining suit; in a common law action on account of his injuries.

The plaintiff argues on the contrary that this point has been ruled by numerous decisions of its Supreme Court in favor of the former ruling. Cases v. United States, supra. Plaintiff insists that a party cannot on a second appeal take advantage of any error which existed and which may have been corrected on the first round, and cites Lamb v. Lamb, 108 Ill. 149, and Mutual Life Insurance Co. v. Hunter, 100 Ill. 34. We conclude that the defendant in insurance precluded from raising any restrictions this appeal which was not urged by it on the former one. We think, however, the cases cited have no application to the facts which are here. Upon the first trial the defendant was successful. The appeal to this court was by the plaintiff and the only ground to be sought error. The defendant was not complaining there of the judgment entered by the trial court, but was apparently satisfied with that judgment. We know of no rule of law by which an appellee in such a case must, at the risk of being precluded from urging his points on his future appeal, assign and argue errors upon a judgment with which he is wholly satisfied. The Supreme court has held directly contrary in City of Litchfield v. Burke, 270 Ill. 611, where a similar point was argued. The court said:

"This rule, however, has no application in this case, because the present appellants were not the appellants in the former case. The questions raised and determined on that appeal were the questions presented by the present appellee. There was no estoppel by virtue of the former appeal. The judgment was reversed and the cause remanded generally. The judgment was conclusive only on the questions actually decided."

See also People v. Waite, 243 Ill. 156; Bailey v. Robinson, 244 Ill. 16; Ralph v. Haas, 73 Fed. 974; and Mutual Life Insurance Co. v. Hill, 193 U. S. 551.

But although the contention of the plaintiff can not be sustained for the reason which he urges, we think that under the undisputed evidence the defendant was not under the provisions of the Workmen's Compensation Act as amended in 1915.

The Workmen's Compensation Act of 1913 is found in the session laws of that year, page 335. It is entitled as an act to promote the general welfare of the people of the State by providing compensation for accidental injuries or death suffered in the course of employment within the State, and providing for the enforcement and administering thereof. It expressly repeals a similar act approved June 10, 1911, and in force July 1, 1911. The third section provides that in an action to recover damages against an employer engaged in any of the occupations, enterprises or businesses enumerated in paragraph B of the section, who shall elect not to provide and pay compensation, according to the provisions of the Act, shall be deprived of his common law defenses. These occupations, enterprises or businesses are enumerated in paragraph B of section 3, and the 6th paragraph thereof provides that "In any enterprise in which statutory or municipal ordinance regulations are now or shall hereafter be imposed for the regulating, guarding, use or the placing of machinery or appliances, or for the protection and safeguarding of the employees or the public therein," and any such enterprise, etc., with others specifically enumerated in the preceding seven

paragraphs, "are hereby declared to be extra-hazardous." It is conceded that if the defendant is deprived of its common law defenses it is by virtue of the provisions of this paragraph 8 of section 3.

An examination of the different amendments (and there have been amendments of this act at practically every session of the legislature since its enactment) shows that this provision of paragraph 8 has at all times remained precisely as it stood when enacted in 1913. The amendments have simply added the (in this suit) unimportant provision that nothing contained in the section shall be construed to apply to workers in employments conducted by farmers or stock raisers. It appears, therefore, that in so far as any of the rights of this defendant are concerned, the Act of 1913 made no substantial change.

The defendant has pointed out a large number of amendments which went into force July 1, 1915, changing the provisions of the Compensation act theretofore in force. These amendments provide for increased compensation in some cases, and in some cases for compensation for injuries which had not been provided for in the prior Act. But the Act of 1913 was not repealed and was not changed in such a substantial way as to make it another and different act from the one under which the defendant made its election of rejection. Indeed, all the changes made, it would seem, added additional burdens to the employer and were for the benefit of the employee. It is not disputed that defendant rejected the terms of the old act. The amendments added no benefits which could supply a motive for the acceptance of the act as amended. Chapter 131 of the Statute of Illinois, paragraph 11, section 2, provides that "the provisions of any

statute so far as they are the same as those of any prior statute shall be construed as a continuation of such prior provisions and not as a new enactment." The amendment of 1915 did not, in our opinion, repeal the law of 1913. The Supreme Court has expressly so held as to the amendment of 1917 in O'Brien v. Chicago City Ry. Co., 305 Ill. 263.

The defendant, however, makes the further point that conceding the foregoing, nevertheless the election of defendant did not have reference to the occupation in which plaintiff was employed, namely, that of a packer, but only to extra-hazardous occupations as defined by the Compensation act. It says that the Supreme Court has held that the employers engaged in hazardous occupations and employments are under the Act of 1913 only subject to its provisions as to those employees who are engaged in an extra-hazardous occupation and employment; that an election by such an employer, engaged in the extra-hazardous occupation and employment, not to pay compensation to the employees who may become injured as the result of their employment, has reference only to those employees of the employer who are likewise engaged in that extra-hazardous occupation and employment; and further, that the presumption is, as provided in the act, that all employers engaged in said extra-hazardous occupation or employment as defined by the act, elect to provide and pay compensation to such of the employees only as may become injured during the course of the employment or while at work engaged in the extra-hazardous occupation and employment.

A large number of cases are cited by the defendant which, it is argued, support this contention. These cases all purport to follow the rule as first laid down in the case of Vaughan's Seed Store v. Simmini, 275 Ill. 477. In that case it was held (as it has been in other cases following that decision)

statute so far as they are the same as those of any other statute should be construed as a continuation of such prior provisions and not as a new enactment." The amendment of 1912 did not, in our opinion, repeal the law of 1911. The Supreme Court has expressly so held as to the amendment of 1912 in Kirkham v. Chicago Rock Isl. R. Co., 200 Ill. 348.

The defendant, however, makes the further point that repealing the foregoing, nevertheless the election of defendants did not take relative to the employing in their industry was analyzed, namely, that of a person, but only to employments exercised as defined by the [illegible]. It appears that the Supreme Court has held that the analyzed employed in manufacturing occupations and employments are under the act of 1912 only subject to the provisions as to those employees who are engaged in an extra-hazardous occupation and employment; that an division by such an employer, engaged in the extra-hazardous occupation and employment, not in any connection in the employment who may become injured as the result of their employment, has recourse only to those employees of the employer who are likewise engaged in that extra-hazardous occupation and employment; and further, that the presumption is, as provided in the act, that all employees engaged in said extra-hazardous occupation or employment as defined by the act, elect to provide and pay compensation to such of the employees only as may become injured during the course of the employment or will be such engaged in the extra-hazardous occupation and employment.

A large number of cases are cited by the defendant which, it is argued, support this contention. These cases all present to follow the rule as first laid down in the case of [illegible] v. Kirkham, 200 Ill. 348. In that case it was held (as it has been in other cases following that decision)

that an employer might be subject to the provision of the Workmen's Compensation Act as to a part of his business which was extra-hazardous, while as to another part of the business not extra-hazardous he would not be subject to such provisions of the act. In practically every one of the cases cited we think it will be found that the real ground of the decision was that the injury received did not arise out of or in the course of an extra-hazardous business. The rule seems to have been materially changed by the amendments to the Compensation act of 1917. See Goldsmith v. Payne, 300 Ill. 119, and McNaught v. Hines, 300 Ill. 167. These amendments do not, of course, affect the question as it arises on this record; but we think the cases cited and relied on by the defendant do not sustain its contention, except so far as it has been held that the injury must arise out of and in the course of the employment in an extra-hazardous business. The Supreme Court of this state has never held that the particular employment of the injured employee is material in deciding that question. In other words, the test of liability, as we read the decisions, has been whether the business as conducted is extra-hazardous, not whether the particular employment at the time of the accident is or is not extra-hazardous, provided, of course, the injury arises out of and in the course of an employment in an extra-hazardous business. In the construction of the Compensation actin that state, the courts of New York have applied the test of whether the particular employment is or is not extra-hazardous. The Illinois courts, on the contrary, have applied the test of whether the business or enterprise is or is not extra-hazardous. The distinction is clearly pointed out in Pekin Cooperage Co. v. Ind. Comm., 277 Ill. 83, and again in Mahoneman Hospital v. Industrial Board, 282 Ill., 316.

The defendant further argues that the court erred in

refusing defendant leave to file additional pleas, verified by affidavit, by which pleas defendant sought to put in issue the averment that defendant had elected not to pay compensation under the act. The motion for leave was not made until after the jury had been discharged and upon the hearing of the motion for a new trial at the subsequent term of court to which the cause had been continued. By an amendment to the Workmen's Compensation Act in 1917 it was provided:

> "If the plaintiff in any action mentioned in section 3 shall in his declaration or in his other pleading allege that the employer has filed notice of his election not to provide and pay compensation according to the provisions of the Workmen's Compensation Act and such allegation be not denied by a verified pleading, then such employer shall for the purposes of that action be conclusively presumed to have filed his notice of non-election."

This section was enacted in 1917 (not in 1913 as the brief of plaintiff states.) It refers to a matter of procedure. Because of amendments made to the declaration it became the duty of the defendant to plead after the enactment of this law. Defendant was therefore bound thereby. We think the court did not err in refusing to file such pleas at a term subsequent to that at which the case was tried.

The defendant further contends that the court erred in admitting over objection evidence for plaintiff tending to show that in defendant's store a circular saw, run by electric power, was operated and used by the plaintiff in the course of his employment; that electric power was generated in the sub-basement of the building; that there were rugs, linoleums and wagons on the 9th floor thereof, and in the packing room; that plaintiff could feel the vibrations of the walls of the building; that the building itself was seventeen stories high; that there was machinery in the basement for the operation of the elevators and for generating high pressure steam; that there were freight elevators in the building driven by water pressure; that the building was electrically wired; and that

there were stairways leading from the basement to the top floor of it. The objection urged to all of this evidence is that the same was not admissible under the allegations of the declaration. It is, of course, elementary that it was unnecessary for plaintiff to plead his evidence. The declaration in each of its counts alleged:

> "that said building consists of divers floors and stories located on or above the other and contained therein divers openings in said floors, which constitute a well or shaft through and in which divers appliances known as elevators moved up and down to and from the said respective floors and stories of said building; and that the said defendant was then keeping, maintaining and using said building and the said elevators and other machinery and appliances thereon in conducting a certain business or enterprise commonly known as a Department Store, which consisted in buying, selling and delivering divers kinds of goods, wares and merchandise."

These allegations when considered in connection with others contained in the declaration, seem to us to be broad enough to permit the introduction of the evidence complained of. The defendant, construing this paragraph of the declaration, says: "No allegation is made that there was any machinery or appliances other than those that were on the elevators," and in support of this construction invokes the rule of grammar that a relative clause usually relates to the nearest antecedent, and cites in this connection Wood v. Baldwin, 10 N. Y. S. 195. That rule, however, as we understand it, does not obtain where the reading of the whole document shows that the sense is otherwise, and such is, we think, the fact here. Under the issues as made up we think most of this evidence was material, and if some of it was immaterial, its introduction was harmless.

The undisputed evidence showed that defendant rejected the Compensation act, and that it was engaged in an extrahazardous business, in the course of which the plaintiff was injured; and that it had been thereby deprived of its common law defenses

there was nothing leading from the basement to the top floor of it. The objection urged in all of this evidence is that one more was not available under the allegations of the indictment, it is, of course, elementary that it was unnecessary for plaintiff to plead the evidence. The indictment is made of the usual allegations:

"Also said building consists of stores floors and stairs on or above the other and contained therein stores opening in said floors, which constitute a well or shaft through and in which stores ascending stairs or elevators moved up and down to and from the said respective floors and stairs of said building, and that the said defendant was the owner, maintaining and using said building and the said stairs and other machinery and appliances therein, in conducting a manufacturing business or establishment therein, and in a dangerous state, unsafe and in violation of the Tenement House Laws of New York, rules and ordinances."

These allegations were considered in connection with others contained in the indictment, such as to be broad enough to permit the introduction of the evidence complained of. The defendant, considering this paragraph of the indictment, said "the allegation is made that there was not machinery or appliances other than those that were on the premises," and in support of this contention invokes the rule of grammar that a relative clause usually relates to the nearest antecedent, and cites in this connection Ross v. Hartshorn, 41 N. Y. 57. That rule, however, as we understand it, does not obtain where the reading of the whole document shows that the verb is plurative, and such is, we think, the fact here. Under the issues as made up on this move of this evidence was material, and if some of it was immaterial, its introduction was harmless.

The multiplicity evidence showed that defendant operated the Conservatory, and that it was engaged in an extensive business, in the course of which the plaintiff was injured; and that it had been informed of its common law defense

of contributory negligence, fellow servant and assumed risk.

The defendant also argues that plaintiff could not recover because (again assuming that it was deprived of its common law defenses) plaintiff, "under his own testimony, unnecessarily exposed himself to danger, and thus he was not within one of the risks which the defendant assumed in the plaintiff's employment." On this point defendant cites Welch v. Sam Berger Hotel Company, 196 Ill. App. 94, which is a simple case at common law where contributory negligence was held to prevent a recovery. The other cases cited in support of this contention prove, upon examination, to have been cases where the controlling question arising was whether the plaintiff had been injured in an accident arising out of and in the course of his employment. In this case that question is settled by the former appeal.

The evidence submitted upon this trial does not differ materially from that submitted by plaintiff on the former trial, and which was reviewed by us upon appeal. We do not deem it necessary to again discuss this evidence, which tended to show that while plaintiff was working for the defendant as a packer of certain of its goods on the 9th floor of the building in which its department store was conducted, and that while waiting for the arrival of certain of these goods from the 8th floor of that building, whence the same were carried by the elevators to the 9th floor, and while sitting on a box, he was struck by a large roll of linoleum, which fell, striking him with such force as to throw him from the box onto the hall floor, thereby producing his injuries. He was, the evidence tends to show (even defendant's evidence) in a place where he might reasonably be engaged in work under the terms of his employment, and even if we were free to consider this question a second time, we should still be disposed to hold that on the uncontradicted evidence the accident in which he was injured arose out of and in the course of his employment.

of contributory negligence, failing evasive and antecedent risk.

The defendant also argues that plaintiff could not recover because [again assuming that it was designed at its maximum for defendant] plaintiff, "under his own testimony, unnecessarily exposed himself to danger, and then he was not within one of the rules which the defendant assumed in the plaintiff's employment." In this point defendant cites Ziegler v. San Pedro Lumber Co., 164 Cal. App. 94, which is a simple case of ordinary law where contributory negligence was held to preclude a recovery. The other cases cited to support of this contention were, upon examination, in some ways inapposite the controlling principle, and therefore the plaintiff did seem justified in an instance where he was in the course of his employment. In this case that question is settled by the jury's verdict.

The evidence conducted upon this trial does not differ materially from that submitted by plaintiff on the former trial, and which was introduced in an appeal court. It is not quite intelligible to again discuss this evidence, which tended to show that while plaintiff was working for the defendant on a platform of scaffolds at the crack on the 4th floor of the building in which the defendant's office was constructed, and that while waiting for the arrival of materials of these cracks from the 6th floor of the building, where the same were hoisted by the elevator in the 4th floor, and while sitting on a box, he was struck by a large roll of linoleum, which fell, striking him with such force as to throw him from the box onto the hall floor, thereby wrecking his health. In sum, the evidence tends to show [some defendant's evidence] in a place where he might reasonably be expected to work under the force of his employment, and even if we were free to accept this position a second time, we should still be disposed to hold that on the uncontradicted evidence the accident in which he was injured arose out of and in the course of his employment.

In its original argument defendant makes objection to a large number of instructions. Its points on this subject, however, are not stated in its brief, nor are the authorities relied on cited there, as required by rule 19 of this court. The plaintiff insists on the enforcement of that part of the rule which says: "No alleged error or point not contained in such brief shall be raised afterward, either by reply brief or in oral or printed argument." Defendant has filed a reply brief in which it does not take exception to this construction of the rule and we would, therefore, be justified in concluding that it agrees to the same and acquiesces therein. The reply brief does, however, argue that instruction No. 14, given at the request of the plaintiff, is erroneous because, it is said, it disregards the element of plaintiff's control and management of the linoleum, and in fact told the jury that if the control and management thereof was in the defendant, that would be sufficient to create prima facie evidence of negligence upon the part of the defendant, even though the control and management might likewise be in the plaintiff. That instruction was as follows:

"The jury are instructed that if you find from a preponderance of the evidence and under the instruction of the court that on the 23rd day of September, 1915, the defendant and the plaintiff were engaged in an extra-hazardous occupation, as alleged in the declaration and as defined in these instructions, and if you further find that on and prior to said date the defendant had elected not to provide and pay compensation according to the provisions of the Workmen's Compensation Act of Illinois, as defined in these instructions and alleged in the declaration, and if you further find that on said date the defendant had without help, assistance or intervention of the plaintiff placed a roll of linoleum against the wall in the packing room of its department store as alleged in the declaration, and if you further find that said roll of linoleum was under the control and management of the defendant, and if you further find that said roll fell and struck the plaintiff, as alleged in the declaration, and if you further find that the said accident, if any, was such as in the ordinary course of things would not have happened if the said defendant had used reasonable and ordinary care in placing said roll of linoleum, then you are instructed that the falling of the roll of linoleum, if you find it did fall as alleged in the declaration, is prima facie evidence of the negligence of

the defendant, and, if uncontradicted by other credible evidence, facts or circumstances appearing in evidence and standing alone, is sufficient to establish the negligence of the defendant, as alleged in the declaration; the court, however, by this instruction does not wish to be understood as expressing any opinion or intimation that the evidence in this case does or does not establish a prima facie case of negligence on the part of the defendant, but it is for the jury to determine from all the evidence, and from all the facts and circumstances appearing in evidence whether the plaintiff has or has not established his case by a preponderance of the evidence as alleged in the declaration."

We do not regard this rather lengthy instruction as subject to the criticism which defendant points out. Indeed, there was no evidence in the record from which a jury could have reasonably found that the plaintiff had anything to do with the placing of this particular roll of linoleum against the wall. If it fell of its own weight, then we think the jury could reasonably find from that fact negligence in the manner in which it was placed such as would make the defendant liable.

The further contention is made that the plaintiff did not sustain the burden of proving his case by a preponderance of the evidence. It is urged that such a conclusion can only be reached by presuming or inferring that the linoleum in question had in fact fallen, and then presuming or inferring that in its fall it had struck plaintiff, and then again presuming or inferring that under the doctrine of res ipsa loquitur the defendant was guilty of negligence in permitting the linoleum to fall. This, it is said, is basing presumption upon presumption, which is not permissible under the rule laid down in Globe Accident Ins. Co. v. Gerisch, 163 Ill. 625, and Condon v. Meherfeld, 214 Ill. 326. That rule has no application to facts such as appear in this case. The direct evidence offered by plaintiff tended to show that the linoleum was in the possession and control of the defendant; that it had been placed by servants of defendant against the wall; that placed as it was, its weight and character were such as would tend to cause

it to fall; that it struck the plaintiff while he was sitting on the box and knocked him off it, causing his injuries. There was further evidence to the effect that the plaintiff had nothing to do with the particular roll of linoleum; nothing to do with its control, custody, or keeping or placing it in position.

The ultimate conclusion that there was negligence on the part of the defendant was not the result of basing inference upon an inference, but, on the contrary, was a conclusion which the jury might reasonably reach from innumerable facts and circumstances which were in evidence, and, as was well said by Mr. Justice Baker in Morris v. Ind. & St. L. R. R. Co., 10 Ill. App., 389, "We know of no rule of law that would preclude a court or jury from drawing several conclusions or presumptions of fact from the same state of circumstances." A rule such as defendant contends for here would make the administration of justice impossible. Wigmore on Evidence, vol. 1, sec. 41. A limitation of the rule seems to be as stated in Morris v. Ind. & St. L. R. R. Co., supra, that where two presumptions are so intimately connected that they both naturally arise out of the same set of circumstances and are component parts of the same transaction, then there is an open and visible connection between the facts out of which the first presumption arises and the facts sought to be established by the second presumption, and that in such case the rule is not applicable. See also Ohio Building Vault Co. v. Industrial Board, 277 Ill. 96.

The briefs in this case are encyclopedic. It is urged in many pages that the damages are excessive. There was much medical testimony for both sides - as usual conflicting. We take judicial notice that the value of the dollar has in the past few years decreased very much. Two juries have passed upon the case and have not differed very much as to the amount of damages. After consider-

ing the testimony, we think, under all the circumstances, we ought not to interfere.

The judgment will therefore be affirmed.

AFFIRMED.

McGurely, P. J., and Johnston, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

BEN BORRIS,
Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE MATCHETT
DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was prosecuted in the Municipal Court of Chicago on an information which charged him with a violation of section 14, chapter 55a of Cahill's Revised Statutes 1921, p. 1895. The information alleged that he, "on the 16th day of September, A. D. 1923, at the City of Chicago, aforesaid, being then and there the owner of and operating a hotel at 600 N. Clark street in the City of Chicago, County of Cook and State of Illinois, did then and there unlawfully and knowingly fail to keep a register in the office of said hotel or other public place therein in which the names and residence of every person who becomes a lodger or guest should be entered therein, together with the date of arrival, the number of room or bed occupied and the period for which lodging was engaged for by said lodger or guest, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois."

The trial was had by the court without a jury. The court found the defendant guilty in manner and form as charged in the information, and specifically found "that said defendant, Ben Borris, is guilty of the criminal offense of being then and there an owner and operating a certain hotel without keeping a proper register, knowingly and unlawfully in the City of

STATE OF THE STATE OF
ILLINOIS,
Defendant in Error,

vs.

BEN MORGAN,
Plaintiff in Error.

Error to
Criminal Court
of Cook County.

Mr. Justice Scott delivered the opinion of the court.

The plaintiff in error was prosecuted in the municipal court of Chicago on an information which charges the sale of a ticketing of writing in violation of Section 2b of Illinois's Revised Statutes 1923, p. 1898. The information alleges that on, the 21st day of September, A. D. 2923, at the City of Chicago, electronic, being then and there the owner of and operating a barber shop at 2. Eight street in the City of Chicago, County of Cook and State of Illinois, did then and there unlawfully and knowingly look in shop a magazine to the effect of said Jerry or other similar place Darwin to which the women and gentlemen of every person can be-come a judge or jurors should be natural Darwin, together with the book of writing, the number of them or the attorney and the period for which judging was engaged for by said judge or jurors, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

The trial was had by the court without a jury. The court found the defendant guilty in manner and form as charged in the information, and specifically found "that said defendant, Ben Darwin, in spite of the criminal offense of being them and there an owner and operating a certain barber shop, a proper regulator, morality and animality in the City of

Chicago, County of Cook, State of Illinois." Judgment was entered and defendant ordered to pay a fine in the sum of $50.

The information was filed by a police officer, and this officer, with his associates, were the only witnesses for the prosecution. The hotel in question was located at number 600 North Clark street in the City of Chicago and was conducted under the name of "The Germania." The officer testified that he went to this hotel at the time in question at about 11:35 P. M.; that he went to the third floor of the hotel; that he was up there four or five minutes listening at the doors of the rooms; that he saw a woman coming from room 32; that she was fully dressed; that a man named DeWill was also there and that he (the officer) asked the woman what she was doing and that she answered that this was a friend of hers; that the man said that this was the first time he had seen her and that he admitted that he had had improper relations with her at that time. DeWill and the woman both testified and denied that any such admission was made. She testified that she was not in room 32 but, on the contrary, was coming from the bathroom at the time in question; while DeWill testified that he had never seen her before; that as a matter of fact he had stopped at this hotel at a prior time when he registered and was charged only a dollar for a room; that at this particular time when he inquired for a room the clerk told him that the charge would be $1.50; that he went upstairs without registering simply for the purpose of inspecting the room in order to decide whether he would stay there or not; that he would have registered had he decided to accept the room.

It is not necessary for us, as we view the case, to decide as to the truth of this conflicting testimony. The gist of the charge is that the defendant as the owner of the hotel failed to keep a register in the office of the hotel. There is no allegation in the information of unlawful conduct in any other

Delaney, County of Cook, State of Illinois." Documents were returned and defendant ordered to pay a fine in the sum of $50.

The information was filed by a police officer, and this officer, with his associates, were the only witnesses for the prosecution. The hotel in question was located at number 100 Fifth Street street in the City of Chicago and was commonly known the name of "The Commodore." The officer testified that he went to this hotel at the time in question at about 11:00 P.M.; that he went to the third floor of the hotel; that he was up there four or five minutes listening at the doors of the rooms; that he saw a woman coming from one of the rooms; that he saw a man coming from the same room; that he (the officer) asked the woman what she was doing and that she answered that she was a friend of Dave; that the man said that she was the first time he had seen her; and that he admitted that he had had intercourse relations with her at that time. Donald and the woman both testified and denied that any such admission was made. The testimony showed that the room in question, "the apartment," was rented from the management of the hotel in question; while Donald testified that he had never seen her before; that he a matter of fact he had stopped at this hotel at a prior time when he registered and was shown only a dollar for a room; that at this particular time when he registered for a room the clerk told him that the charge would be $5.00; that he went upstairs without registering simply for the purpose of leaving the room in order to decide whether he would stay there or not; that he would have registered but he intended to escape the rain.

It is not necessary for us, as we view the case, to decide as to the truth of this contradicting testimony. The gist of the charge is that the defendant in the county of the hotel failed to keep a register in the office of the hotel. There is no allegation in the information of unlawful entrance in any other

respect. A page was taken out of the book which was known as a register in the hotel office and this original exhibit appears in the record. It shows the name of the hotel and contains a statement that money, jewelry and other valuables must be placed in the safe in the office, otherwise the hotel will not be responsible for any loss, and underneath are appropriate blanks for the name, residence, room and time of arrival of the guests. It is not suggested in what respect this register fails to comply with the law, and we think the evidence, far from showing that the defendant failed to keep a register in the office of the hotel, affirmatively shows that he kept a proper one. The information does not charge that the failure to require DeWill to register was any offense. This might be evidence indicating another and different charge, but we are concerned only with the case before us. We think there was no evidence tending to show a violation of the statute as alleged and for this reason the judgment will be reversed.

REVERSED.

Johnston and McBurely, JJ., concur.

property. A page was taken out of the book which was known as a register in the Navy office and this contained valuable opinions in the events. It shows the name of the burgl and describes a statement that money, jewelry and other valuables must be placed in the safe in the office, otherwise the burgl will not be responsible for any loss, and moreover his opinions change the time, place, frame and time of arrival of the guests. It is not supposed is what prevent this register fails to comply with the law, and by these the evidence, for from showing that the burglars failed to keep a register in the office of the burgl, effectively shows that he kept a proper one. The information does not show that the failure to comply should be a bar to either one or other. This might be evidence indicating neglect and different change, but we are concerned only with the case before us. We think there can be evidence sufficient to show a violation of the statute as alleged and for this reason the judgment will be reversed.

REVERSED.

Cameron and Kennedy, JJ., concur.

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M. I. CLARA HOFFMAN, Appellee, vs. W. H. MACQUEEN & COMPANY, a corporation, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by W. H. Macqueen & Company, appellant, from a judgment in the Municipal Court of Chicago for $700 in favor of M. I. Clara Hoffman, appellee. The gist of the statement of claim filed by appellee is that appellant "fraudulently and deceitfully" substituted five shares of the stock of appellant for certain bonds which appellee had purchased from appellant. The affidavit of merits of appellant denied the charge. The case was submitted to a jury and the verdict of the jury was in favor of appellee for the sum of $700.

The principal issues in the case are questions of fact. Most of the facts are in dispute. On the material issues there are only two witnesses - appellee and Macqueen. The undisputed facts are substantially as follows:

Appellant Macqueen & Company, a corporation, is engaged in the business of selling first mortgage bonds on real estate. To advertise the business the company printed and published a pamphlet entitled "Macqueen's Manual, Being a Handbook of Information for Conservative Investors." One of the pamphlets was sent to the home of appellee. Before she had any business dealings with appellant she read the pamphlet. She testified that "it was more or less Greek" to her, but she remembered that it "speaks about stockholders, and women should never invest in stock." An agent of appellant by the name of Rehnsser, called on appellee at her house about 1913 or 1915 before she had any

business dealings with appellant, and "talked in a general way about gold mortgage real estate bonds, and said it was the safest investment for little savings."

The pamphlet of appellant is elaborately gotten up. It consists of thirty-one pages and many illustrations, some of which are colored. It states the character of its business as follows:

"While we discuss other forms of investments, we want to emphasize the fact that the business of W. S. Macqueen & Company is confined exclusively to First Mortgages and First Mortgage Gold Bonds secured by high-class income bearing Chicago real estate, the title to which is guaranteed by the Chicago Title & Trust Company." It is further stated that "We are happy in the knowledge that no customer of ours at any time has ever lost a penny either principal or interest on any First Mortgage Bond bought of us." It also says: "We have at all times stood ready to help anyone in need of advice on financial matters. We, therefore, cordially invite you to communicate with us * *." There are three pages of the pamphlet devoted to a discussion of "Thoughts for Woman Investors." In this discussion it is said that "there is just one right answer" to the question which every woman with money to invest "must ask" and that is, "Put it in First Mortgage Real Estate Bonds." The pamphlet contains testimonial letters in regard to its honesty and integrity.

In December, 1916, appellee went to Macqueen & Company and saw Macqueen. She bought some bonds from him. What was said between them is one of the issues of fact in the case. Appellee testified that she told him that she "had no business experience and never had invested money in a place like this and hoped that" she "was going to have a safe investment." She says

that "he did not say very much, only that the mortgage bonds were safe investments." Macqueen denies that she told him that she had had no business experience. He says she came in, told him that she was a school teacher and that she would like to buy two hundred dollars worth of bonds; that she asked general questions and that he answered them; that she asked what the terms were and what the bonds paid, and that "he explained it" to her; that he gave her no general advice as to investments. He says that he delivered the bond to her and that she looked it over. About a year later appellee bought another bond from Macqueen & Company, dealing this time with one of the company's employees, a women named Hansen. Appellee testifies that she had $200, "some extra money," and that she took this and $200 of bonds, went to Macqueen and Company, saw Macqueen and told him that she would "like to have it on one instead of having different mortgage bonds." She says that "Macqueen states something" that she "did not understand," and "remarked something 'in the house,'" and that she "thought it was the Otis Building." [The Otis Building is the one in which appellant is located. In the pamphlet there is a picture underneath which is the following: "The Otis Building. In which are located the commodious general offices of W. H. Macqueen & Company." Counsel for appellee stated in their brief that the words under the picture are as follows: "The Home of Macqueen & Co." We do not find those words under the picture, but in the table of contents there are the following words: "Our Business Home, page 2;" and on page 2, which is opposite, there appears a picture of the Otis Building.]

Appellee stated that Macqueen did not tell her "what building this $800 was to be on;" that he said "All right," "went out and took the money and my mortgages, bonds, and came back with the paper and put it in an envelope, and told me to write my name

in the book." She says she wrote "her name," took the envelope down to the vault and left it there.

It appears from the evidence that in this transaction appellee received a certificate for five shares of the common capital stock of Macqueen & Company. In 1918 appellee also got a certificate for two shares of the same stock from Macqueen personally. She says that at this time she had no "special conversation" with him; that he asked her if she "wanted the same as the other" and that she said "Yes." She says she did not read it; that she "never saw any capital stock in any company at any time." She testified that neither on this occasion nor on the other when she received the certificate for five shares did she know that she was receiving stock, but that she thought Macqueen had given her bonds. In this connection, she testified that in 1919 she saw an article in the paper about "the East and McGinnis case;" that "her friends were talking about it so" she "got the papers and brought them home and showed it to her, and her sister, being a business woman" she told her "this was stock and not bonds." In stating the testimony of appellee in regard to the principal issues of fact in the case, we have used the language of the witness as nearly as possible.

Appellee further testified that she first complained about the certificates being stock and not first mortgage gold bonds in 1919; that she went down to see Macqueen but he was not in; that she showed Kraft, an employee of Macqueen, the stock certificates, and asked him "where that money was invested;" that Kraft replied that it was invested "here in the furniture, in the house." She states further that she asked him "where is the furniture house," and that he said, "Why, it is the furniture here" - evidently meaning that it was the furniture in the office of Macqueen and Company. He stated that he did not state

"what building these bonds were on," but that "he just said the house."

Appellee further testified that she saw Macqueen in 1920, told him she had lost or resigned her position on account of her hearing and ill health, that she had many doctor's bills, needed money and that she would like to have him exchange "those five mortgages" or give her the money back. The evidence shows that he refused either to make the exchange or to return the money.

In regard to this transaction in which it is charged that appellant substituted stock certificates for bonds, Macqueen testified that appellee came to his office, stated that other bond houses were offering more than 6 per cent; that she said they had mortgages paying 7 per cent; that she wanted to know if she could get a bond paying 7 per cent. Macqueen testified that he told her appellant company had no mortgage bonds that paid 7 per cent, but that they had shares in the business at the present time paying 7 per cent; that if she cared to exchange the bonds for a share in the business, they would be glad to do so, and that she could think it over; that she came in and said she "had made up her mind to exchange her bonds for a share in the business." Macqueen gave her a certificate for five shares of stock and he says that at the time he delivered it to her he "explained to her that she was now becoming a part of the business of Macqueen & Company;" that "she was interested in the success of the business;" that "her profits depended upon the volume" of their "sales;" and that she also "signed a receipt for the certificate."

The outline of the evidence which we have given is sufficient to show the nature of the principal disputed issue of fact which was presented to the jury. There are facts and

circumstances which tend to render improbable the testimony of appellee. She retained the stock for a considerable length of time after she learned of the substitution of the stock for the bonds. She received dividends from the stock and attended a stockholder's meeting, at which she voted. She says, however, she did not understand the nature of the meeting, and not being able to hear well, depended for information upon a friend who accompanied her. The delay of appellee in taking any action after learning of the substitution may be partly excused by a letter which she received from appellant, saying that the company had listed appellee's name with the secretary "and should he hear of any one in the market for stock, he will let you know." This letter was in reply to one that appellee had written to appellant saying that she "expects" appellant "to redeem those stock papers." The fact that appellee received dividends on the stock is explained by her by saying that she thought it was "interest on her bonds."

There are facts and circumstances which tend to corroborate appellee. The language she uses throughout her testimony shows that she understands little or nothing of business details. She speaks of the stock certificates throughout her testimony as "those papers;" and even in her letter to appellant, which was written after she had discovered what she contends was the fraudulent substitution of stock certificates, she still uses the expression "those stock papers." It is contended by appellant that she is intelligent, and stress is laid on the fact that she is a school teacher. She may be intelligent, but in our opinion she seems to have no idea of business methods or terms. She testified that the pamphlet was "more or less Greek to her" and all she remembered of it was that it "speaks about stockholders, and women should never invest in stock." The only

business fact that seemed to be firmly fixed in her mind was that she should buy bonds and not stock.

There is an improbability in Macqueen's testimony that he substituted certificates of stock for appellee's bonds with appellee's knowledge, when it is remembered that the pamphlet of Macqueen & Company expressly states as follows: "We want to emphasize the fact that the business of F. M. Macqueen & Company is confined exclusively to First Mortgagesand First Mortgage Gold Bonds." Moreover, the idea of the superiority of bonds over stock is carried throughout the pamphlet. Women particularly are told to buy bonds; and the pamphlet says, "Let us see why that is true, why this form of investment for women is so much superior to every other." Following this statement the reasons are set forth. Macqueen may well be asked why he was proposing a form of investment to a woman which is emphatically condemned by his company generally, and especially for women. Furthermore, there is a fact of material significance which tends to corroborate appellee in her statement that she did not know that Macqueen had substituted stock certificates for her bonds, and it is this: After she had made what, according to her testimony, she supposed was the exchange of several bonds for one, she purchased a bond, not stock, from Kraft, an employee of Macqueen & Company. She testified that when Kraft gave her "the paper" she asked him if it was "all right," as she "noticed it was different than the other papers were;" that he said it was; and that she said: "Well, the other papers I had to write my name in the book there with Mr. Macqueen." Kraft replied, "Take this, it is all right." Kraft did not testify, and the testimony of appellee stands uncontradicted. This evidence cannot be reconciled with Macqueen's testimony that appellee knew he had given her stock certificates in place of her bonds, and that when

she bought "two more shares of stock," he told her he "was glad she was satisfied with her investment so far." If she was so well satisfied with the stock she had purchased, why did she afterwards buy a bond from Kraft instead of more stock? Moreover, she knew she had "signed a receipt" when Macqueen gave her what she testified that she supposed was one bond for several, and she questioned the correctness of the transaction with Kraft because she did not "sign a receipt." She knew that she was buying a bond from Kraft, and the fact that she thought a receipt was necessary is a circumstance tending to corroborate her testimony that when she signed a receipt for the document that Macqueen gave her she thought it was a bond.

The evidence does not show that appellee was an intelligent business woman. On the contrary, it shows that she was lacking in knowledge of business terms and business methods. The jury believed her version of the transaction and rejected that of Macqueen. They saw both witnesses give their testimony and had an opportunity of observing their manner and demeanor while testifying. This fact is one of decided and material value. We are of the opinion that the verdict is not manifestly against the weight of the evidence.

It is contended by counsel for appellant that the measure of damages was not correctly ascertained; that as there was an affirmance of the contract, appellee would only be entitled to the difference between the value of the certificates of stock at the time of the transaction, and the value of first mortgage bonds of the Kina contracted for, and that there is no evidence in the record upon this question. In answer to this objection, we may state that the record does not show a conclusive affirmance of the contract on the part of appellee; moreover, appellee's action in this case is not brought on the

are bought "two more shares of stock," he buys low in "one line
is see satisfied with her investment so far." If she has so
well satisfied with the stock she has purchased, why is she
afterwards buy a bond from Stock Exchange at much greater expen-
ses, she knows she has "signed a lawsuit" that Englishman give
her that she justified that she acquired her so much for profit.
All she considers the characteristic of the transaction with their
because she is a "realist." She knows that she was
buying a good firm itself, and she just had the thought reality
was necessary if a businessman trying to distinguish the reali-
ty with what she claims a reality for the firmness that
happens case her she thought it was a case.

The reasons lead her that applying was an in-
telligent business reason. On the contrary, it turns that she
was leading in knowledge of business facts all business outlook.
The jury believed her version of the transaction and verdict
that it happens. They was both witnesses give their testimony
and had an opportunity of observing their manner and behavior
while testifying. This fact is one of decisive the material
value. In use of the opinion that the verdict is not contrary
against the weight of the evidence.

It is evidence by manner for appellant that the
amount of damage was not correctly ascertained; that is there
was no evidence of the contract, appellee must only be en-
titled to the difference between the price of the merchandise
at about at the time of the transaction, and the price at which
appellee bought of the item contracted for, and that there is
no evidence in the record upon this question. It appears to
this objection, we may infer that the trial Court not take a
consistent statement of the contract or the fact of appellant
whatever, appellee's action in this case is not brought on the

theory of an affirmance of the contract, but on a rescission of the contract and a tender back of what appellee received under the contract.

Counsel for appellant further argues in the alternative that a proper tender was not made. The evidence shows that appellee offered to deliver the certificates of the shares of stock upon the return of her bonds or money. We think that this was a sufficient tender. She elected to rescind the contract, and by that election she was required to place the appellant in statu quo, or "at least offer to do so." Bowen v. Schuler, 41 Ill. 198, 196; Zeringer v. Pilts, 135 Ill. App. 553, 554. Furthermore, a written demand was made on appellant for the return of the bonds for which, it is alleged, the certificates of stock were fraudulently substituted by appellant. In this demand the tender previously referred to was made. The bonds were not returned by appellant. "When it is shown tender would be useless or unavailing, it is unnecessary to make it even if it were a condition precedent." Kincaid v. Overshiner, 171 Ill. App. 37, 42.

Counsel for appellant contends "that the representations must be such that an ordinarily prudent person would rely on as true;" and in this connection, counsel further contends that the court refused to give instructions specifically requested by appellant to the effect that it was the duty of appellee to exercise ordinary care and caution in the transaction with appellant. It has been held that where there is an intentional and deliberate fraud, "it is not the privilege of the perpetrator of the fraud to interpose a defense that the one defrauded was not sufficiently careful to discover the fraud and prevent its accomplishment." Hess v. Voicker, 308 Ill. 270, 274. As the essence of the action in the case at bar is that appellant was guilty of

deliberate fraud in substituting certificate of stocks for bonds, the question of due caution or care on the part of appellee is not involved. According to the case of Hess v. Reicker, supra, appellee did not have to use care to discover and prevent the fraud. The rule of ordinary care and caution relates to honest transactions, not to fraudulent ones.

It is objected by counsel for appellant that reversible error was committed by counsel for appellee when he made the following offer to Macqueen: "Well, I will remit our fees and give you the whole thing for six hundred dollars right now." The remark of counsel was improper, but we do not think that in the circumstances in which it was made it was so prejudicial that it would require reversal. Macqueen was being cross-examined in regard to appellant's having increased its capital stock from $100,000 to $200,000, and volunteered the remark that the company was "pretty good to" appellee; that it tried to buy her stock; that a couple of years ago it offered her "six hundred dollars and she refused to take it." Macqueen was then asked by counsel for appellee if he would give six hundred dollars for it today. He replied, "I am not buying any stock personally." He was then asked if his company would pay six hundred dollars. He answered: "The company isn't buying it." Then counsel made the remark that is objected to. Macqueen "opened the door" to the subject about which the remark was made. People v. Phipps, 268 Ill. 210, 215. He tried to gain favor with the jury by stating that the company had been "pretty good" to appellee in offering to buy her stock for six hundred dollars. Appellant is not in a position to complain, if counsel attempted to do for appellee what Macqueen tried to do for appellant. We do not think that the remark should be considered

as prejudicial error.

It is further objected by counsel for appellant that the court erred in allowing counsel for appellee to question Macqueen about the capital stock of appellant.

In our opinion this did not constitute reversible error.

Counsel for appellant further contends that the court erred in admitting the pamphlet of appellant entitled, "Macqueen's Manual, Being a Handbook of Information for Conservative Investors." As we have previously stated, the pamphlet describes the character of business in which appellant is engaged. It was sent to appellee by appellant, and this is not denied. It "cordially" invites those to whom it is sent to communicate with the company. In other words, it is a direct and express solicitation of business. Appellee testified that she read it, and, although it was "more or less Greek to her," she understood that it advised prospective purchasers, principally women, to buy bonds and not stock. The sending of the pamphlet to appellee by appellant and the reading of it by appellee were acts which, in part at least, induced appellee to enter into business relations with appellant. In the case of Prout v. Martin, 160 Ill. App. 11, it was alleged that a dentist in repairing the teeth of the plaintiff had fraudulently and deceitfully pretended that the process he was using was a process known as the "Alveolar process." A pamphlet which related to the "Alveolar Method" was admitted in evidence. It seems to have been admitted by the court on two grounds, first because it was "in regard to the new Alveolar Method, which it was claimed was patented and exclusively practiced by the dentist;" and second, for the further reason that "it was discussed and the method talked about between the plaintiff and the defendant."

In the case of Jackson v. The People, 126 Ill. 139, which was a prosecution for obtaining money under false pretenses, an advertisement for the sale of a horse was admitted in evidence. The court said (p. 147): "Evidence of the particular advertisement leading to the sale of this horse was clearly competent. It was shown to have led Hines to call at the place designated in the advertisement, where he found the defendant with the sorrel horse mentioned, and at the defendant's place of business."

We are clearly of the opinion that the pamphlet was admissible.

Counsel for appellant further contends that the lower court erred in admitting in evidence a letter from appellee to Macqueen, written after the transaction in which it is alleged that the substitution of stock for bonds was made. The letter restates at some length appellee's version of the facts relating to that transaction; also states that appellee had tried several times to see Macqueen but was unable to see him; refers to appellee's ill health and financial embarrassment, and states that appellee expects Macqueen "to redeem those stock papers." Counsel for appellant contends that this letter is self-serving and inadmissible. While the letter is of doubtful admissibility, in our opinion no reversible error was committed by the court in not excluding it. Substantially everything contained in it was brought out in the testimony of appellee. The letter is merely cumulative. James White Memorial Home v. Haag, 204 Ill. 422; Covenant Benefit Ass'n. v. Spiez, et al., 114 Ill. 433; 5 Jones' "The Blue Book of Evidence," section 896, p. 392.

In the case of James White Memorial Home v. Haag, supra, the court said (p. 429): "Where, as in the case at bar, the evidence given by the witness is merely cumulative, and where,

In the case of *Jackson v. The Queen*, [1975] 1 S.C.R. 548, which was a prosecution for violations along under Table Five Leaves, in characterizing the mens rea of a person who assists in suicide. The court said (p. 549): "Violation of the provincial criminal statutes leading to the well if will bring the clearly responsible. It was meant to cover the cases in which at the time indicated in the criminal, which is those the accused with the person upon assistance, but is not the Parliament's view of morality."

We are already of the opinion that the [illegible] and admirable.

Counsel for appellant Tessier argued that the Queen must prove in addition to establish a rather more lenient standard, namely that the transaction is valid if it is alleged that the consideration of which the Queen was made. This latter analysis of some length appellant's reading of the Court relied on the first transaction; also cited that appellant the Queen against Tessier on the judgment for the Queen if not [illegible] Tessier's III Dwight and Tessier's [illegible] that appellant Tessier argued that the [illegible] "[illegible]" counsel the [illegible] contract that this latter is self-serving and inadmissible. While the latter is of [illegible] admissibility, in our opinion no [illegible] which the accused by the [illegible] be not [illegible]. [illegible] evidence [illegible] if it was proven but in the business of [illegible]. The latter is merely [illegible]. *Jones [illegible] Queen v. Jones*, [illegible]; *Tessier [illegible] v. Tessier*, [illegible]. The [illegible] [illegible] "[illegible]," [illegible].

In the case of *Jones [illegible] Queen v. Jones*, [illegible], the court said (p. [illegible]): "There, as in the case of [illegible] the evidence given by the [illegible] is merely [illegible], and where,

taking the whole evidence, the same result must have followed without the evidence objected to, we will not feel warranted in reversing the case that has been submitted to the jury merely for such error." The tendency of the courts is to give as wide a scope as possible to the investigation of the facts. Williamson v. United States, 207 U. S. 425, 451. As was said by Lord Chief Justice Cockburn: "People were formerly frightened out of their wits about admitting evidence lest juries should go wrong. In modern times we admit evidence and discuss its weight." Jack v. Mutual Reserve Fund Life Ass'n., 112 Fed. 49, 56.

Counsel for appellant assigns error on the giving and refusing of instructions. We do not think that any reversible error was committed by the court in this respect. The objection of counsel goes principally to the refusal of the court to give instructions on the obligation of appellee to exercise ordinary care and caution in the transaction with appellant in which it is alleged that appellant fraudulently and deceitfully substituted stock for bonds. We think that the instructions were properly refused, as the gist of the action in the case at bar is for fraud and deceit.

In our opinion there are no errors in the record sufficiently prejudicial to require the case to be sent back to the lower court for a new trial.

McSurely, J., concurs.

Matchett, P. J., dissenting: I think that the admission in evidence of the self-serving letter referred to in the opinion of the court was error for which the judgment should be reversed.

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(32371)

JOHN W. STURTEVANT and C. EARLE PATTERSON,
Appellants,

vs.

ST. FRANCIS HOTEL CO., a Corporation, et al.,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

The complainants filed their bill to foreclose a trust deed executed by the St. Francis Hotel Company conveying a leasehold estate on certain premises in Chicago, Illinois. This proceeded to a decree which is not questioned by this appeal except as to the disposition therein made of the petition of Carl Leon Eddy, who was held entitled to $5998.60, and given a lien therefor against the amount found due the complainants, to be paid out of their share of the proceeds of sale.

Eddy filed a petition alleging that after the bill was filed complainant Patterson, representing that he was the agent of Oliver T. Reilly, receiver, entered into negotiations with him for leasing the hotel on the premises. They agreed on a five-year term and a written lease was duly made and delivered, signed by Eddy and also by Reilly as receiver. This lease contained an option in the receiver to cancel the same upon sixty days notice. Eddy was unwilling to make the necessary repairs and alterations if he might be compelled to vacate before the expiration of the full term. Further negotiations were had with Patterson, resulting in a second lease without a cancellation clause. This lease was signed by Eddy and delivered to Patterson, who promised to obtain the signature of the receiver, who was out of town, and assured Eddy that his possession would not be disturbed.

Eddy proceeded at considerable expense to prepare the building for occupancy as a hotel, relying on the representations of Patterson. These negotiations were known to the other complainant, Sturtevant, who was present at some interviews and had knowledge of the making of the alterations and improvements by Eddy. Sturtevant told Eddy that whatever was satisfactory to Patterson would be satisfactory to him.

Some time thereafter a sixty day notice, signed by Reilly, as receiver, was served upon Eddy, ordering him to vacate the premises. Thereupon Eddy filed his petition in this proceeding setting forth the above facts, asking that the receiver be ordered not to disturb his possession, and asking for general relief. The complainants filed an answer to this petition, denying its allegations.

It was later determined that Reilly had never been appointed receiver, and on motion of complainants Frank G. Laudt was appointed receiver of the premises and the courtordered him not to disturb Eddy's possession pending the disposition of his petition.

Subsequently complainants asked for permission to lease the premises to another tenant at a greatly increased rental, and in presenting their motion agreed in open court that if they were permitted to make the new lease they would pay for all improvements which Eddy could show he had made upon the premises. Thereupon reference was had to a master in chancery to take proof as to such improvements, and the lease to the new tenant was ordered. The master took a large amount of evidence and found there was due Eddy $7971.24 for improvements made by him. A decree was entered approving the master's report, except the court reduced the amount found due to Eddy to $5998.60 on the ground that some of the items were for temporary rather than permanent improvements.

Duly presented at quarterly sessions to uphold the building for occupancy as a hotel, relying on the representations of Fairview. Three magistrates were above in the other complainants, disturbers, who now present as some interviews and had knowledge of the making of the alterations and improvements by Daly. Chairman felt Daly that whatever was indefinitely in Fairview would be satisfactory to him.

Some time thereafter a date was received, signed by Daly, as vendor, was served upon Daly, asserting his to revoke the premises. Thereupon Daly filed his petition in this proceeding setting forth the above facts, saying that the vendor is entitled not to disturb his possession, and making the general allegations. The complainants filed an answer to this petition, denying the allegations.

It was later determined that Daly had never been appointed receiver, and on motion of complainants Frank C. Lundy was appointed receiver of the premises and the instrument did not to insure Daly's possession pending the determination of his petition.

Immediately complainants asked the petitioner to lease the premises to another tenant at a greatly increased rental, and in presenting their petition argued in open court that if they were permitted to make the new lease they would pay for all improvements which Daly could show he had made upon the premises. Inasmuch performance was had in a matter in chancery to take proof in to such improvements, and the lease to the new tenant was entered. The master took a large amount of evidence and found there was due Daly $7371.76 for improvements made by him. A decree was entered approving the master's report, except the court reduced the amount found due to Daly to $5000.00 on the ground that some of the items were in indefinite value improvement expenditure.

Counsel for appellant has not attempted to make any abstract of the evidence, so we must presume that the facts are as above stated. Under rule 13 of this court, where the record contains the evidence, the abstract shall condense the same so as to present clearly and concisely its substance, and it must be sufficient to present fully every error and exception relied upon. The failure to file a complete abstract has been repeatedly held to be ground for an affirmance. Riches v. City of Springfield, 208 Ill. 28; Stands v. Schumacher, 187 Ill. 187; Bush v. Crozier, 140 Ill. App. 278; Good v. Woodruff, 208 Ill. App. 147.

When complainants filed an answer to the petition denying its allegations they waived all questions of its propriety and are estopped from asserting now that the petition was not germane.

The action of the court may be affirmed upon the merits. Complainants, by purporting to act as agents for an alleged receiver and inducing the petitioner Eddy to make permanent improvements upon the property, made themselves liable as principals for the same. A person who assumes to act as agent for a legally incompetent principal renders himself personally liable to the person with whom he deals. Ryerson v. Shaw, 277 Ill. 524; Rash v. Bronson, 196 Ill. App. 518.

The complainants are bound by their agreement made in court to reimburse Eddy for his expenses in improving the property; this was made as a condition of obtaining the court's permission to remove Eddy from possession and to make a lease to another tenant at an increased rental. Such an agreement was entirely proper and binding upon complainants, and it would be wholly inequitable, after Eddy had acted thereupon, to permit complainants to avoid their undertaking.

Counsel for appellant has not attempted to make any
abstract of the evidence, so we must assume that the facts are as
above stated. Under this is an idle course, since the general plea
takes the evidence, the abstract must assume the case as to be
proper, clearly and concisely its substance, and it must be suffi-
cient to present fully every error and material point made. The
failure to file a complete abstract has been repeatedly held to be
ground for an affirmance. Ingham v. Bank of Bainbridge, 90 Ill.
App. Green v. Commerce, 148 Ill. 537; Dean v. Lawson, 120 Ill.
App. 1; Deal v. Dunlap, 90 Ill. App. 447.

This appellant did not argue to the jury
during the allegations they waived all questions of its competency
and are estopped from asserting now that the partition was not
proper.

The action of the court may be affirmed upon the
merits. Conclusively, by proceeding to sell as equitable for an
adjust matter and vacating the judgment-order to make alter-
nate improvements upon the property, such improvements inure to
principle for the same. A person who assumes to act as agent for
a family homestead cannot acquire adverse possession against
is the person who is when he assis, Ingham v. Bank, 177 Ill. 541;
Bank v. Bowman, 184 Ill. App. 313.

The complainants are bound by their agreement made in
court to relinquish only the one acreage in controversy the prop-
erty; this was made on a condition of terminating the entire pro-
ceeding to recover the; from possession and to hold a lease of
another tract at an increased rental. Such an agreement was en-
tirely proper and binding upon complainants, and it would be
wholly inequitable, after the trial court thereupon, in giving
complainants to avoid their undertaking.

Upon general equitable principles the allowance of Eddy's claim was just. He was induced by the complainants to expend a considerable sum of money upon the property which would inure to their benefit. It would be wholly inequitable to permit them to secure this improvement of the premises and then deprive Eddy of its use and possession without reimbursing him. Whatever informalities there may have been in the proceeding, substantial justice was done by the decree protecting Eddy's rights.

From the above considerations we hold that the decree should be affirmed.

AFFIRMED.

Hatchett, P. J., and Johnston, J., concur.

(32581)

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CITY OF CHICAGO, Appellee, vs. M. H. GALLNER, Appellant.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO

Appellant.

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Solnitsky, General No. 24525, opinion filed by this court March 25, 1918.

Affirmed.

325712

28680

CITY OF CHICAGO, Appellee, vs. MARCHEY GOODCHESKI, Appellant.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Solnitsky, General No. 24528, opinion filed by this court March 25, 1918.

Affirmed.

24661

CITY OF CHICAGO, Appellee,	)	
vs.	)	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO
WALTON M. GALLNER, Appellant.	)	

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Selnitsky, General No. 24320, opinion filed by this court March 25, 1918.

AFFIRMED.

326171

[illegible]

CITY OF CHICAGO, Appellee, vs. M. H. GARDNER, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

[illegible]

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Melnitsky, General No. 24323, opinion filed by this court March 28, 1918.

AFFIRMED.

28683

CITY OF CHICAGO, Appellee, vs. MAX ISAAC, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Solnitsky, General No. 24323, opinion filed by this court March 25, 1918.

AFFIRMED.

20004

CITY OF CHICAGO, Appellee, vs. JOHN DOE, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Solnitsky, General No. 24323, opinion filed by this court March 25, 1918.

AFFIRMED.

(32672)

20005

CITY OF CHICAGO, Appellee, vs. CHARLES NAVARRA, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Selnitsky, General No. 24323, opinion filed by this court March 25, 1918.

AFFIRMED.

13263

28686

CITY OF CHICAGO, Appellee, va. HARRY [illegible], Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Solnitsky, General No. 24325, opinion filed by this court March 25, 1918.

Affirmed.

28687

132661

CITY OF CHICAGO, Appellee, vs. M. K. [illegible], Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO

23 [illegible] 4

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Solnitsky, General No. 24323, opinion filed by this court March 25, 1918.

AFFIRMED.

1341

28666

CITY OF CHICAGO, Appellee, vs. SAM ROSEN, Appellant.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Solnitsky, General No. 24325, opinion filed by this court March 25, 1918.

AFFIRMED.

28689

CITY OF CHICAGO, Appellee, vs. GEORGE EISTEIN, Appellant.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO

PER CURIAM. In the above case the City of Chicago, appellee, has moved that the judgment of the trial court be affirmed for the reason that the appellant has not filed the record in this case on or before the second day of the present term of this court, as required by the statute. Section 100, chapter 110, Practice Act, provides that under such circumstances the Appellate Court may affirm the judgment, and this is accordingly done, following the reasons set forth in City v. Solnitsky, General No. 24323, opinion filed by this court March 25, 1918.

AFFIRMED.

(32672)

20 - 28266

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO
vs.	CRIMINAL COURT OF COOK COUNTY.
JOSEPH MaGrady, otherwise called Joseph McGrady, Plaintiff in Error.	

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On April 27, 1922, the defendant, Joseph McGrady, was indicted for the alleged crime of taking indecent liberties with a child. The indictment contained two counts. In the second count it was charged that the defendant, on February 19, 1922, in said Cook County, "did knowingly, unlawfully and willfully do certain acts which then and there directly tended to render a certain male child, under the age of 17 years and of the age of 8 years, to-wit, one John Ernst, a delinquent child, to-wit, did then and there take certain immoral, improper and indecent liberties with the said John Ernst." The defendant pleaded not guilty and after a trial the jury returned a verdict finding him "guilty in manner and form as charged in the second count of the indictment," and further finding that he "is now about the age of 32 years." The court overruled his motions for a new trial and in arrest of judgment, and on July 5, 1922, adjudged him "guilty of the said crime of contributing to the delinquency of a child, upon the indictment in this cause, on said verdict of guilty," and sentenced him to the House of Correction for one year and also to pay a fine of $200. By this writ of error he seeks to reverse the judgment.

On Sunday, February 19, 1922, the prosecuting witness, John Ernst, a boy about 8-1/2 years of age, lived with his parents, brothers and sisters in an apartment building at

IN THE STATE OF ILLINOIS,
Defendant in Error,

vs.

FRANKLIN KEARNEY, alias Frank Keaney Kearney,
Defendant in error.

MOTION TO
DISMISS WRIT OF
ERROR BY
DEFENDANT IN ERROR.

MR. EDWARD JONES MOVES TO DISMISS THE WRIT OF ERROR IN THIS CAUSE.

On April 27, 1944, the defendant, Franklin Kearney, was indicted for the alleged crime of taking indecent liberties with a child. The indictment contained two counts. In the second count it was charged that the defendant, on February 19, 1937, in Cook County, "did knowingly, unlawfully and wilfully do certain acts which then and there directly tended to corrupt a certain male child, under the age of 17 years and of the age of 3 years, to-wit, one John Doe, a fictitious child, to-wit, did show and there take certain immoral, improper and indecent lib-pics with the said John Doe." The defendant pleaded not guilty and after a trial the jury returned a verdict finding him "guilty in manner and form as charged in the second count of the indictment," and further finding that "in the case the age of 20 years." The court sentenced him to prison for a term fixed and in arrest of judgment, and on July 3, 1945, adjudged him "guilty of the male crime of contribution to the delinquency of a child, upon the indictment in said cause, on said verdict of guilty," and sentenced him to the House of Correction for one year and also to pay a fine of $500. By this writ of error he seeks to reverse the judgment.

In October, November 17, 1937, the prosecutrix ste-
ven, John Doe, a boy about 3-1/2 years of age, lived with his parents, brothers and sisters in an apartment building at

No. 331 North California Avenue, Chicago. The family occupied the front flat on the first floor. A woman named Vickey Smazowski (hereinafter referred to as Vickey) lived alone in the rear flat, consisting of two rooms - a living-room and kitchen combined and a bed-room. Between the two flats was a hall-way. The rear door of the Ernst flat opened into this hallway, and directly opposite was the entrance door into Vickey's kitchen. There was no door - only an opening - between Vickey's kitchen and bed-room. The defendant was a friend of John Ernst's father and also of Vickey and frequently visited them. He was a carpenter by trade and employed in that capacity by the Board of Education of Chicago for about 9 years, excepting the period of about 14 months when he served in the United States Navy. On the afternoon of February 19th, about 3 o'clock, defendant called at the Ernst flat and visited with Mr. Ernst. At this time Mrs. Ernst and the children were temporarily away from home. Defendant testified in substance that during the visit Mr. Ernst served him with 9 or 10 drinks of "moonshine whiskey" for which he paid Mr. Ernst; that later in the afternoon Mrs. Ernst and the children returned and he shortly thereafter left and called on Vickey in her flat and, with her consent, went into the bed-room, laid down and went to sleep, and did not awaken until about 11 o'clock that night, when he arose, bade Vickey "good night", went again into the Ernst flat to procure an overcoat which he left there, again saw Mrs. Ernst and also bade her "good night" and left for his own home.

The story of the prosecuting witness, John Ernst, as related on the stand is extraordinary. He testified in substance that after supper and when it was dark he went into Vickey's kitchen and saw Vickey and defendant sitting there; that he conversed with defendant, who asked him to go into the adjoining bed-room; that upon his refusal defendant picked him up and

Mr. Ian Boyle Calderwood Jones, Solicitor. The Daily Telegraph
the Front Flat on the First Floor. A woman named Vickey (hereinafter referred to as Vickey) lived alone in the rear flat, consisting of the room - a kitchen-cum-bedroom and bathroom and a bed-room. Between the two flats was a hall-way. The main door of the front flat opened into this hallway, and directly opposite
\- only an opening -
was the entrance door into Vickey's kitchen. There was no door between Vickey's kitchen and bed-room. The defendant was a friend of John Smart's father and also of Vickey and frequently visited them. He was a conductor by trade and employed in that capacity by the Board of Education of Calcutta for about 9 years, excepting the period of about 14 months when he served in the United States Army. On the afternoon of February 5th, about 5 o'clock, defendant called at the front flat and visited with Mr. Smart. At that time Mrs. Smart and the children were temporarily away from home. Defendant testified in mahogany that during the visit Mr. Smart served him with 9 or 10 drinks of "moonshine whiskey" for which he paid Mr. Smart. Mr. Smart left in the afternoon for, Smart was the middle returned and he shortly thereafter left and called on Vickey in her flat and, with her consent, went into the bedroom, laid down and went to sleep. He did not awaken until about 11 o'clock that night, when he arose, took Vickey "good night", went again into the front flat to procure an overcoat which he left there, again was last seen and then took the "last train" for home.

The story of the prosecuting witness, John Smart, is related on the stand in extraordinary. He testified in substance that after supper and when it was dark he went into Vickey's kitchen and saw Vickey and defendant sitting there; that he conversed with defendant, who came him to go into the adjoining bedroom; that upon his refusal defendant followed him to the door

carried him into the bed-room and caused him to perform an abominable act on defendant's person, promising him a dollar when he got through; that he cried when he was being carried into the bed-room, but that Vickey did not say anything and only laughed; that when the act was performed defendant gave him a dollar bill and he went into the kitchen where he again saw Vickey and also saw his sister, Marie Ernst; that he then told his sister what had happened and asked her to go home with him; that she did not do so but remained in Vickey's kitchen; and that he then went home and immediately told his father and mother what had happened and showed them the dollar bill. The witness exhibited a dollar bill to the jury, which he claimed was the same bill which he received from defendant at the time and which had been put for safe-keeping in his "father's drawer in the box."

Marie Ernst, aged 10 years and a sister of the prosecuting witness, testified in behalf of the People, in substance, that she had known defendant for about two years as a frequent visitor at the Ernst home and as a friend of her father; that on the afternoon in question, when she, her mother, sister and brothers returned to the flat, she saw defendant there conversing with her father; that defendant was then sober and that she saw no liquor being served; that shortly thereafter defendant went into Vickey's flat; that she did not see him again until about 8 o'clock in the evening when she went into Vickey's flat and saw him lying in bed in the bed-room, apparently asleep, and did not talk to him; that when she entered Vickey's flat she saw her brother and Vickey in the kitchen and Vickey was cooking; and that her brother left the flat before she did. She made no mention of seeing her brother come out of the bed-room or of his saying anything to her or asking her to go home with him.

Joseph Murphy, a witness called on behalf of defendant, testified in substance that in February, 1922, he was employed as

carried him into the bedroom and caused him to perform an abominable act on Gutenberg's person, somewhere in a dollar down in gay fourteen; that he drank when he was being carried into the bedroom, but that Vickery did not say anything and only laughed; that when he had now performed Gutenberg over the a dollar bill and he went into the kitchen where he found Van Vickery and also one Ole Olsen, Norse tramp; that he then had bill stolen and had buttoned and asked him to go home with him; that he did not do so but remained in Vickery's kitchen, and that he then was immediately told his father and mother that he had lowered them the dollar bill. The witness exhibited a dollar bill to the jury, which he claimed was the same bill which he received from defendant at the time and which had been put by wife keeping in his "father's drawer in the bed."

Uncle Tony, aged 14 years and a sister of the prosecuting witness, testified in behalf of the People, in substance, that she had been defendant's for about two years as a frequent visitor at the house here and as a friend of her father; that on the afternoon in question, about six, her mother, sister and brothers returned to the flat, she was detained there conversing with her father; that otherwise she was not with her father; that he is about being asleep; that she did not see him until about 8 o'clock in the evening, when she went into Vickery's flat and saw him lying on bed in the bedroom, apparently asleep, and did not talk to him; that when she entered Vickery's flat she saw her brother and Vickery in the kitchen and Vickery was smoking; and that her brother left the flat before she did. She made no mention of seeing her brother come out of the bedroom or of his supposed inability to bar or waiting her to go home with him.

Joseph Murphy, a witness called on behalf of defendant, testified in substance that in February, 1899, he was employed on

night watchman by a coal company; that the company's yards were located immediately across the street from the Ernst home; that he was accustomed to get his supper and lunch at Vickey's; that he was well acquainted with the Ernst family, had frequently visited at their home and on several occasions had drank liquor there, furnished by Mr. Ernst, in defendant's company; that on the evening of February 19th, he went to Vickey's flat to get his supper about 7:30 o'clock and stayed there until about 8:30 o'clock; that he saw several of the Ernst children coming in and out of the kitchen during the time; that he saw defendant lying on the bed in the bed-room "speechlessly drunk;" that he did not see John Ernst go into the bed-room or defendant carry the boy therein; and that during the entire time of his stay in Vickey's flat defendant remained in the bed-room.

Mrs. Ernst, mother of the prosecuting witness, testified in behalf of the People in substance that when she returned to her home on the afternoon of February 19th she saw defendant conversing with her husband; that defendant was then sober and shortly thereafter departed and went into the Vickey flat; that about 8 o'clock in the evening John Ernst went into the Vickey flat and was gone about 30 minutes; and that when he returned he talked to her and Mr. Ernst and gave the latter a dollar bill. Mrs. Ernst further testified that defendant left the Vickey flat about 11 o'clock that evening; and that she saw him when he left, but that she made no inquiries of him and "just bid him good night."

Defendant strenuously denied the story as told by John Ernst, or that he at the time in question or at any other time ever took any indecent liberties with him. Fourteen witnesses testified to defendant's good character and reputation in the community in which he lived. Neither Mr. Ernst nor Vickey testified.

After a careful examination of the evidence we are not satisfied that defendant was proven guilty of the crime charged beyond a

night outdoors by a dead companion; that the company's people were located immediately across the street from the house; that he was accustomed to get his supper and lunch at Vickery's; that he was well acquainted with the Ernest family, but frequently visited at their home and on several occasions had seen Miss Ernest there; furnished by Mr. Ernest, in defendant's company; that on the evening of February 12th, he went to Vickery's flat to get his supper (but Tim O'Clock and other there until about 9:00 O'clock; that he saw several of the guest children coming in and of the kitchen during the time that he was interested lying on the bed in the bed-room "unconsciously drunk" that he did not see John Ernest go into the bed-room or defendant entry the bed-room; and that during the entire time of his stay in Vickery's flat defendant remained in the bed-room.

Mrs. Ernest, mother of the prosecuting witness, testified in behalf of the people in substance that when she returned to her home on the afternoon of February 12th she was informed concerning visit her daughter; that defendant was there sober and shortly thereafter departed and went into the Vickery flat; that about 6 o'clock in the evening John Ernest went into the Vickery flat and was gone about 20 minutes; and that when he returned he talked to her and Mr. Ernest and gave the latter a dollar bill. Mrs. Ernest further testified that defendant left the Vickery flat about 11 o'clock that evening; and that she saw him when he left, but that she might be mistaken of him was "just his good build."

Defendant strenuously denied the story as told by John Ernest, or that he at the time in question or at any other time ever took any indecent liberties with him. Numerous witnesses testified to defendant's good character and reputation in the community in which he lived. Neither Mr. Ernest nor Vickery testified.

After a careful examination of the evidence we are not satisfied that defendant was proven guilty of the crime charged beyond a

reasonable doubt. In the case of People v. Johnson, 308 Ill. 52, our Supreme Court calls attention to the danger of resting a conviction on the testimony of a child of tender years and says (p. 55) that "such a conviction ought not to stand unless the testimony is corroborated or is otherwise clear and convincing." The boy's testimony in the present case is not corroborated and is not clear and convincing when the testimony of the other witnesses for the People is carefully considered. In People v. Allen, 279 Ill. 150, 158, it is said, quoting from People v. Freeman, 244 Ill. 590: "This court is committed to the fullest extent to the doctrine that the jury are the judges of the facts and the weight of the evidence in criminal cases. It is the duty, however, of the court to carefully review the evidence, and where a conviction is based upon unsatisfactory evidence, or where, after it has been carefully examined and considered, there remains such a grave and serious doubt of the guilt of the accused as to lead to the conclusion that the verdict of the jury is the result of passion or prejudice and not of that calm deliberation that the law requires, then it is the duty of this court to so find." In the present case we have such doubt of the guilt of defendant as leads to that conclusion, and we think that it is in the interest of justice that the judgment be reversed and the cause remanded for another trial. Certain errors in rulings on evidence and in giving a certain instruction are claimed by counsel for defendant, but as these errors, if they are such, will probably not occur on another trial it is useless to discuss them.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

psychiatric court. In the case of Lynch v. Johnson, 195 Ill. 58, our Supreme Court held obtaining by the lawyer of testimony a conviction on the testimony of a child of tender years and says (p. 60) that "such a conviction might be based upon the testimony in controversy or in otherwise clear and convincing." The boy's testimony in the present case is not contradicted and is not clear and convincing when the testimony of the other witnesses for the People is carefully considered. In People v. Allen, 272 Ill. 198, 208, it is said, quoting from People v. Dowling, 244 Ill. 580: "This court is committed to the fundamental doctrine that the jury are the judges of the facts and the weight of the evidence in criminal cases. It is the duty, however, of this court to carefully review the evidence, and where a conviction is based upon circumstantial evidence, or where, after it has been carefully considered and compared, there remains such a grave and reasonable doubt of the guilt of the accused as to lead to the conclusion that the verdict of the jury is the result of passion or prejudice and not of that calm deliberation that the law requires, then it is the duty of this court to reverse." In the instant case we have such doubt of the guilt of defendant as leads to that conclusion, and to doubt that it is in the interest of justice that the judgment be reversed and the cause remanded for another trial. Courts errors in judging on evidence and in giving a certain instruction are claimed by counsel for defendant, but on these errors, if they are such, will probably not occur on another trial. It is unnecessary to discuss them.

Reversed and remanded.

Hall and Barnes, JJ., concur.

55 - 28325

HERBERT H. POWERS,
Appellant,

vs.

HURT HORNMAN,
Appellee.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for the alleged false imprisonment of plaintiff. The declaration, consisting of three counts, was filed on July 9, 1920. Defendant filed a plea of not guilty and four special pleas. Plaintiff's demurrer to the third and fourth special pleas was sustained, but his demurrer to the first and second special pleas was overruled, and replications to the last mentioned pleas were filed. A trial was had before a jury on November 10, 1922, and at the conclusion of plaintiff's evidence the court directed the jury to return a verdict finding the defendant not guilty, which was done, and judgment against plaintiff for costs followed. By this appeal plaintiff seeks to reverse the judgment. No printed brief and argument has been filed in this appellate court by defendant. It appears that the trial court directed the verdict on the theory that plaintiff's action should have been for malicious prosecution rather than, as charged in all counts of the declaration, for false imprisonment.

Plaintiff's evidence disclosed in substance the following: Plaintiff, an experienced mechanic, and defendant, a merchant engaged in the sale of jewelers' supplies, both resided in San Francisco, California. In July, 1918, defendant called on plaintiff with the object of having the latter construct, if he could, an automatic machine which would successfully produce small saws, similar to those made in Germany and used in the manufacture

of gold, silver, platinum and other jewelry. A verbal contract was made whereby plaintiff was employed by defendant, at a satisfactory weekly stipend, to construct for defendant such a machine, which he afterwards did, - he retaining the ownership and possession of all drawings, tracings and blue prints prepared by him and used in the work. Other machines were afterwards built and plaintiff was employed to superintend the operation of the machines and continued to do so until early in May, 1920, when he sent all of the drawings, etc. to Chicago, and shortly thereafter left San Francisco for Chicago. When defendant learned of plaintiff's departure, he called at the Detective Bureau in San Francisco, and caused the following telegram, addressed to James L. Mooney, Chief of Detectives, Chicago, and dated May 15, 1920, to be sent:

> "Arrest for felony, embezzlement, Herbert Powers, 35, five feet seven, 190 pounds, medium complexion, light hair turning gray. Should arrive Chicago yesterday. Red fibre trunk. Mold tools and drawings found in his possession. Locate through his father, Millard Powers, 1930 Harris Trust Building, 115 West Monroe Street.
> (Signed) D. A. White, Chief of Police."

After the receipt of this telegram, Charles Engle, a sergeant of police in Chicago, showed it to one of the judges of the Municipal Court of Chicago, at the Harrison street station, and on May 20, 1920, signed, swore to and filed in said Municipal Court a complaint, though he had no knowledge or information on which to base it other than the contents of the telegram. The complaint is in part as follows:

> "That on or about the 8th day of May, 1920, in the County of San Francisco and State of California, the crime of embezzlement was committed, in this, that Herbert Powers did on May 8, 1920, in the County of San Francisco, State aforesaid, while employed as agent for Bert Nordman, without the consent of the said Bert Nordman, embezzle and convert to his own use with intent to steal the same, drawings and drawing tools of the value of $10,000, goods and chattels of Bert Nordman, which said goods and chattels came into his possession by virtue of his employment, and did then and there in manner and form aforesaid the said goods and chattels feloniously take, steal and carry away, contrary to the form of the statute," etc.; "that this complainant has just and reasonable grounds to believe, and does believe,

of gold, silver, platinum and other jewelry. A vocal sentiment was made whereby plaintiff was employed by defendant, as a salesmanager-in-chief, to secure for defendant a [illegible] machine, which he afterwards did - he retaining the ownership and possession of all devices. Defendant was then unable profitably to use and used in the work. Other machines were afterwards built and plaintiff was employed to superintend the operation of the machines and endeavored to do so until early in May, 1920, when he sold all of the machines, etc. in Chicago, and thereby converted the proceeds for himself. Upon defendant's learning of plaintiff's departure, he called at the Detective Bureau in San Francisco, and caused the following telegram, addressed to Jesse L. Nunnery, Chief of Detectives, Chicago, and dated May 19, 1920, to be sent:

"Arrest for felony, embezzlement. Original Bearer, L. Five feet seven, 150 pounds, medium complexion, light hair, medium build, [illegible] mustache. Has diamond [illegible] front. Talk tough and carrying fright in his possession. Is also known as [illegible], Atlanta Texas, 1120 Atlantic Texas Building, 111 West Monroe Street.

(Signed) "A. A. White, Chief of Police."

Upon the receipt of this telegram, Captain Tuohy, a sergeant of police in Chicago, showed it to one of the judges of the Municipal Court of Chicago, at the Harrison street station, and on May 24, 1920, [illegible] sworn to and filed in said municipal court a complaint, though he had no knowledge or information on which to base it other than the contents of the telegram. The complaint is as follows:

"Filed on or about the 24th day of May, 1920, in the County of Cook Franklin and State of California, the crime of embezzlement was committed, in this, that Harry A. Brown on the 1st day of, 1920, in the County of Los Angeles, this aforesaid, while employed as agent for Lee Lewis in selling the machine of the said Harry Brown, embezzle and convert to his own use with intent to defraud him same, drawing and having held of the value of $1,000, gold and diamonds of Fort Dearborn, which said goods and chattels came into his possession by virtue of his employment, and did then and therein feloniously and fraudulently take the said goods and chattels feloniously take, steal and carry away, contrary to the form of the statute," etc.; "that this complainant has just and reasonable grounds to believe, and does believe,

> that the said Herbert Powers committed said offense; that * * he is informed and believes and * * states that said Herbert Powers is now legally charged by complaint and warrant in the courts of said County of San Francisco in the State of California with committing the crime of embezzlement, * * and that said Herbert Powers * * fled from the jurisdiction of the County of San Francisco and State of California, and is now within the jurisdiction of the Municipal Court of Chicago, * * is a fugitive from justice, and is liable by the Constitution and laws of the United States to be delivered over upon the demand of the executive of the State of California aforesaid."

A fugitive warrant was issued on the complaint, plaintiff's bail was fixed at $2,500 and he was arrested on May 24, 1920. He signed the required bail bond and was temporarily released. On the same day the Chief of Police in San Francisco received the following telegram, signed by James L. Meaney, Chief of Detectives at Chicago:

> "Herbert Powers admitted to bail on fugitive warrant. Case continued to June 2nd. Have officer here with necessary extradition papers that date. Will vigorously fight extradition. Advise."

After receiving information of plaintiff's arrest and after the receipt of the last mentioned telegram in San Francisco, defendant appeared before the grand jury in San Francisco and testified, and as a result an indictment was returned by that body against plaintiff on May 26, 1920. On the following day defendant, as a part of the extradition procedure, signed, swore to, and caused to be filed in the Superior Court of California in and for the city and county of San Francisco a formal complaint, and on May 28, 1920, pursuant to the provisions of the Constitution and laws of the United States, the Governor of California issued his requisition addressed to the Governor of Illinois for plaintiff's arrest and his delivery to a named agent for transportation to California. In said complaint defendant alleged in substance that he was the president of the Universal Steel Products Company, a California corporation, and as such president was the complaining witness in the case of the People of the State of California against Herbert Powers, "embezzlement by agent;" that on May 8, 1920, said Powers was the

that the said Burford's forces committed said attempt, that * * he is informed and believes and * * * charge that Burford's forces in new Jersey charged by complaint and warrant in the county of Cook County of the Provinces in the state of California with committing the crime of criminal, * * and that said Burford's forces * * flee from the jurisdiction of the county of San Francisco and state of California, not in how to flee the jurisdiction of the municipal court of Chicago, * * in a manner (see Illinois) and be liable for the consideration and laws of the United States to be delivered over upon the demand of the executive of the state of California aforesaid."

A fugitive warrant was issued on the complaint, plaintiff's bail was fixed at $8,500 and he was arrested on May 24, 1950. He signed the required bail bond and was temporarily released. On the same day the Chief of Police in San Francisco received the following telegram, signed by James L. Kenney, Chief of Detectives of Chicago:

"Burford forces committed to bail on fugitive warrant. Case continued to June 2nd. Have officer here with necessary extradition papers that date. Will expeditiously fight extradition. Advise."

After receiving information of plaintiff's arrest and after the receipt of the last mentioned telegram in San Francisco, defendant appeared before the grand jury in San Francisco and testified, and as a result an indictment was returned by that jury against plaintiff on May 24, 1950. In the following day defendant, as a part of the extradition procedure, signed, swore to, and caused to be filed in the superior court of California in and for the city and county of San Francisco a formal complaint, and on May 24, 1950, pursuant to the provisions of the Constitution and laws of the United States, the Governor of California issued his requisition addressed to the Governor of Illinois for plaintiff's arrest and his delivery to a named agent for transportation to California. In said complaint defendant alleged in substance that he was the President of the Universal Credit Jewelry Company, a California corporation, and as such president was the complaining witness in the case of the People of the State of California against Burford Powers, "embezzlement by agent," that on May 8, 1950, said Powers was

foreman in the shop of said corporation in San Francisco, and as such foreman had the custody of certain drawings, etc. and certain taps, of the value of more than $10,000 and being the personal property of said corporation; that on May 8, 1930, he feloniously embezzled and converted to his own use the said drawings, etc., without the consent of said corporation, or Nordman, and with the intent to defraud said corporation; that when he was questioned about the embezzlement "he admitted it, but fled before action could be taken against him;" and that he is a fugitive from justice and is now in Illinois. Defendant further alleged in the complaint "that the application for the requisition of Herbert Fewers is made in good faith and for the sole purpose of punishing the said Herbert Fewers, that affiant does not desire or expect to use the prosecution for the purpose of collecting a debt or for any private purpose whatsoever, and will not - directly or indirectly - use the case for any of the said purposes."

It further appears that plaintiff resisted extradition; that the Governor of Illinois on receipt of the papers referred the question, as to whether plaintiff should be delivered to said agent for transportation to California, to the Attorney General of Illinois; that there was a hearing before that official on June 16, 1930, at which defendant was present and testified, resulting in the recommendation that the requisition of the Governor of California be refused, which recommendation was followed by the Governor of Illinois, and plaintiff was not extradited; and that on June 19, 1930, the Municipal Court of Chicago dismissed the proceedings there pending against plaintiff and he was discharged. The statements or testimony of defendant given on the hearing before said Attorney General tended to show that, contrary to the allegations made by him in his complaint filed in the Superior Court of California on May 27, 1930, the real object of the proceedings was the recovery by defendant or by the corporation,

Lawson in the step of said corporation in such Transaction, and on such fraudulent and the authority of certain drawings, etc., and certain here, of the value of more than $10,000 and being the actual property of said corporation; that on May 8, 1906, he fraudulently embezzled and converted to his own use the said drawings, etc., without the consent of said corporation, or thereon, and with the intent to defraud said corporation; that when he was questioned about by subordinates "he replied to, but that before action could be taken against him" and that he is a resident from Jurisdiction and is now in Illinois. Indictment further alleges in the complaint "that the application for the revocation of Northern Powers is made in good faith and for the sole purpose of prosecuting the said Northern Power, that affiant does not desire or expect to use the possession for the purpose of conferring a benefit on far any private purpose whatever, and will not - directly or indirectly - use the same for any of the said purposes."

It further appears that PLAINTIFF received extradition; that the Governor of Illinois on receipt of the papers referred the question, as to whether plaintiff should be delivered to said agent for transportation to California, to the Attorney General of Illinois; that there was a hearing before that official on June 16, 1908, at which defendant was present and represented, including in the recommendation that the revocation of the Governor of California be refused, which recommendation was followed by the Governor of Illinois, and plaintiff was not extradited; and that on June 19, 1908, the Municipal Court of Chicago dismissed the proceedings there pending against plaintiff and he was discharged. The statements or testimony of defendant given on the hearing before said Attorney General behind to that fact, contrary to the allegations made by him in his complaint filed in the Superior Court of California on May 27, 1908, the real object of the proceeding was the recovery by defendant or by the corporation.

Universal Steel Products Company, of the drawings, etc. from plaintiff, and that plaintiff had never signed any agreement that the said drawings, etc. should be the property of defendant or said corporation.

It is to be noticed that while plaintiff was arrested in Chicago on May 24, 1920, by virtue of the complaint of Officer Engle filed on May 20, 1920, no indictment was returned in California against plaintiff until May 26, 1920. And it does not appear that any formal charge against plaintiff was made before any court or magistrate in California prior to May 26, 1920. It is provided in section 10126 of the U. S. Compiled Statutes of 1918, p. 1670, as follows:

> "Fugitives from State or Territory. --Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. * * "

It is provided in section 1 of the Illinois Act in relation to fugitives from justice (Cahill's Stat. 1921, Chap. 60, Sec. 1):

> "That whenever the Executive of any other State, or of any Territory of the United States, shall demand of the Executive of this State any person as a fugitive from justice, and shall have complied with the requisitions of the Act of Congress in that case made and provided, it shall be the duty of the Executive of this State to issue his warrant under the seal of the State, to apprehend the said fugitive, directed to any sheriff, coroner or constable of any county of this State, or other person whom the said Executive may think fit to intrust with the execution of said process."

It is apparent from these statutes that the Governor of this State, into which an alleged fugitive from justice may

Universal Steel Foundries Company, of the Treasury, etc. from plaintiff, and that plaintiff had never signed any agreement that the said Jacobsen, etc. should be the property of defendant or vice versa.

It is to be noted that while plaintiff was arrested in Alaska on May 24, 1930, by virtue of the complaint of Officer Engle filed on May 20, 1930, no indictment was returned in California against plaintiff until May 28, 1930. And it does not appear that any formal change against plaintiff was made before the court of magistrate in California prior to May 30, 1930. It is provided in section 1208 of the P. C. Complied Statutes of 1929, p. 1870, as follows:

> "Fugitives from state or territory. --Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and shall produce a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with crime, or chargeing such person with having been convicted of crime, certified as authentic by the governor or chief magistrate of the state or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. . . ."

It is provided in section 2 of the Uniform Act in relation to fugitives from justice (Cahill's Ann. 1931, Comp. 88, Sec. 1):

> "Upon demand for the surrender of any other state, or of any territory or the United States, shall demand of the Executive of this state that person as a fugitive from justice, and shall have complied with the provisions of the act of Congress in that case made and provided, it shall be the duty of the executive of this state to cause the person named in the demand to be apprehended and secured until he can be delivered to the agent of the state or territory making the demand, or the person authorized by the Executive of the state or territory to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. Provided, that nothing in this act shall be construed to require the surrender of any person who shall be a citizen of this state, or other person when the crime for which he is demanded shall not be a felony under the laws of the state where the same was committed."

It is apparent from these statutes that the Governor of this state, is the which an alleged fugitive from justice may

have fled, has no power or authority to issue a warrant for that fugitive's arrest until he has been furnished with a copy of an indictment or proper affidavit, properly certified, etc. (19 Cyc. 89; Roberts v. Reilly, 116 U. S. 80, 95; Compton v. State of Alabama, 214 U. S. 1, 6.) and the power and authority of the Municipal Court of Chicago to cause the arrest before requisition of an alleged fugitive from justice is derived from Section 2 of said Illinois Act, which reads as follows:

> "Arrest before requisition -- Complaint -- Warrant - Section 3. When a person is found in this State charged with an offense committed in another State or Territory, and liable, by the Constitution and laws of the United States, to be delivered over upon the demand of the Executive of such other State or Territory, any judge, justice of the peace or police magistrate may, upon complaint under oath, setting forth the offense, and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person charged before the same or some other judge, justice of the peace or police magistrate within this State, to answer to such complaint as in other cases."

As we read this statute it was essential to the jurisdiction of the Municipal Court of Chicago in issuing the warrant for plaintiff's arrest, as was done on May 20, 1920, that it be alleged and subsequently proved that at the time said warrant was issued plaintiff either had been previously indicted or formally charged by affidavit or otherwise in California. Such has been the construction of similar statutes in other jurisdictions. (People v. Warden of City Prison, 82 N. Y. Supp. 439; Ex parte White, 49 Calif. 433; State v. Mafford, 25 Iowa 391; Smith v. State, 21 Neb. 552.) In the present case it appears that no formal charge of any kind against plaintiff had been made in California until May 26, 1920, six days after the warrant was issued by said Municipal Court.

After a careful review of the record we are of the opinion that the Circuit Court erred in directing the jury to return a verdict of not guilty and in entering the judgment

hope that, due to power or authority to issue a warrant for that purpose, arrest could be made (without with a copy of an indictment or proper affidavit, properly constituted, etc. (in the [illegible]) Dalton v. Dalton, 140 C. A. 2d, 791. Section 1. Code of Alabama, Title 15, [illegible] and the power and authority of the municipal Court of Birmingo to issue the arrest before presentation of an affidavit Complaint from Jefferson in helpful from section 2 of said Alabama act, which reads as follows:

> Issued before presentation -- Complaint -- Warrant -- Section 2. When a person is found in this state charged with an offense committed in another state or country, and fleeing, or the indictment and laws of the United States, he be delivered over upon the demand of the Governor of such other state or Territory, any judge, justice of the peace or police magistrate may, upon complaint made with affidavit setting the offense, and with other evidence in support, issue a warrant to arrest the fugitive and bring him before the same or any other judge, justice of the peace or police magistrate to be dealt with according to law.

As we read this statute it was essential as the jurisdiction of the municipal Court of Birmingo to issue the warrant for plaintiff's arrest, as was done on May 20, 1966, that it be alleged and subsequently proved that at the time said warrant was issued plaintiff either had been previously indicted or formally charged by affidavit or otherwise in California. Much has been the construction of similar statutes in other jurisdictions. Florida v. Jones of the Prison, 20 S. C. 1, 1884; In re Wise, 10 Cal. 267; Ex parte v. Bulford, 38 Iowa 377; Ex parte v. Sohn, 22 Kan. 283; In the present case it appears that no formal charge of any kind against plaintiff had been made in California until May 20, 1966, six days after the warrant was issued by said Municipal Court.

After a careful review of the record we are of the opinion that the Circuit Court erred in directing the jury to return a verdict of not guilty and in overruling the judgment

appealed from. Plaintiff alleged in his declaration a case of false imprisonment and we think that the evidence was sufficient to warrant a jury passing upon the case. False imprisonment is defined by a statute of this State as "an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority." (Criminal Code, Cahill's Stat. 1921, Chap. 38, Sec. 227.) "A person who procures the issuance by a judicial officer of a void warrant of arrest is liable in damages for false imprisonment." (13 Am. & Eng. Ency. Law, 2nd Ed. 734; Berger v. Saul, 113 Ga. 869, 871; 3 Wait's Actions and Defenses, p. 319.) Furthermore, "although a person is arrested under a legal warrant, and by a proper officer, yet, if one of the objects of the arrest is thereby to extort money, or to enforce the settlement of a civil claim, such arrest is a false imprisonment by all who have directly or indirectly procured the same, or participated therein for any such purpose." (3 Wait's Actions and Defenses, p. 319; Sloman v. People, 25 Ill. 70, 72.) There was evidence tending to show that defendant caused the arrest hoping thereby to gain possession of the drawings, etc., in question for his own pecuniary benefit or that of the corporation of which he was president.

For the reasons indicated the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Fitch and Barnes, JJ., concur.

[illegible] false imprisonment and so holds that the evidence was sufficient to warrant a jury finding against the plaintiff. False imprisonment is defined by a statute of this State as "an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority." (Criminal Code, Liability's Stat. Ann., Chap. 38, Sec. 319.) "A person who procures the imprisonment by a judicial officer of a well minded of absent is liable in damages for false imprisonment." (Id. Sec. 2 Sec. 320, Sec. 321 Ill. Criminal Code, Ill. Ann. Stat. Chap. 38 Sec. 319 - Liability's Antonio and Jefferson, 2d. 1941). Furthermore, "whenever a person is arrested under a legal warrant, and by a proper officer, yet if it was at the objects of the arrest to harass or annoy, or to deprive the petitioner of a civil issue, such issue is a false imprisonment by all the same character as malicious prosecution and, or unjustifiable threats for any such purpose." (Liability's Antonio and Jefferson, 2d. 1941. Gilmore v. Fuller, 1 Ill. App. 351). There was evidence tending to show that defendant caused the issuance of the warrant for the purpose of the arrest, etc., to prevent the plaintiff's or from of the minor "Jan" of which he was guilty.

For the reasons included the judgment of the trial court is reversed and the cause remanded.

Reversed and remanded.

Tilton and Dunne, JJ., concur.

70 - 28543

MARY C. TILDEN, Defendant in Error,	ERROR TO
vs.	CIRCUIT COURT, COOK COUNTY.
B. H. TILDEN, Plaintiff in Error.	

MR. PRESIDING JUSTICE GRIDLEY DELIVERED THE OPINION OF THE COURT.

On February 18, 1920, complainant filed her bill in the Circuit Court of Cook County against her husband, B. H. Tilden, praying for separate maintenance and the custody of their female child, Mary Augusta, then about six years of age. The defendant answered and, after replication filed, there was a hearing before the court resulting in the entry of a decree in complainant's favor on December 14, 1922.

In the decree the court found in substance that the parties were residents of Cook County and had been such residents for more than one year immediately preceding the filing of the bill; that they were married on March 2, 1912, and from that time and until February 16, 1920, had lived together as husband and wife; that there had been born to them the said child who was still living; that on February 16, 1920, defendant commanded complainant to leave their home, which she did, taking the said child with her; and that since February 16, 1920, she has been living separate and apart from her husband without her fault. The court further found that certain acts of cruelty and bad treatment, specifically mentioned, had been committed by defendant towards complainant during the time the parties were living together, and that during said time defendant, although well able financially so to do, failed and refused to provide complainant with necessary clothing and food,

or funds with which to purchase the same. The court further found that during the time the parties were living together defendant purchased and caused to be conveyed to complainant in fee simple four pieces or parcels of real estate (described in the decree), and that defendant is possessed of real estate valued at more than $180,000. The court decreed that complainant was entitled to a separate maintenance from defendant; that she be allowed, and that defendant pay to her, the sum of $200 per month, commencing from the date of the entry of the decree, until the further order of the court; and that defendant pay complainant forthwith the further sum of $300 as and for her solicitor's fees. The court further decreed that complainant have the custody, control and education of the said child, subject to the further order of the court, and that "the title to said real estate described herein be and the same is hereby confirmed in said complainant as the owner thereof in fee simple."

From this decree defendant prayed an appeal to this appellate court which was allowed upon his filing a bond of $5,000 within a specified time and he was given 60 days within which to file a certificate of evidence. He did not, however, perfect his appeal, but on February 23, 1923, sued out this writ of error. No certificate of evidence is contained in the present record, but it appears from the clerk's transcript that on February 10, 1923, defendant filed a petition in the Circuit Court praying for a modification of the decree as to the custody of said child and also for an order vacating the decree in so far as it required defendant to pay complainant $200 per month and the further sum of $300 as solicitor's fees. On February 20, 1923, after a hearing, the court so modified the decree as to permit defendant to visit the child at all reasonable times, etc., but refused to make any modification of the decree as to alimony and solicitor's fees.

a funds with which to purchase the same. The court further found that during the time the matters were filed, important developments occurred and caused to be conveyed to complainants in the simple four pieces or parcels of real estate (described in the decree), and that defendant is possessed of real estate valued at more than $100,000. The court ascertained that complainants are entitled to a separate maintenance from defendant; that she be allowed, and that defendant pay to her, the sum of $100 per month, commencing from the date of the entry of the decree, until the further order of the court; and that defendant pay complainant's attorney the further sum of $500 as and for her solicitor's fees. The court further decreed that complainant have the custody, control and education of the said child, subject to the further order of the court, and that "the title to said real estate described herein be and the same is hereby modified in said complainant as the sole owner thereof in fee simple."

From this decree defendant prayed an appeal to the appellate court which was allowed upon his filing a bond of $3,000 within a specified time and he was given 60 days within which to file a certificate of evidence. He did not, however, perfect his appeal, but on February 26, 1938, sued out this writ of error. The certificate of evidence is contained in the present record, but it appears from the clerk's transcript that on February 16, 1938, defendant filed a petition in the trial court asking for a modification of the decree so as the custody of said child and also for an order vacating the decree in so far as it requires defendant to pay complainant $100 per month and the further sum of $500 as solicitor's fees. On February 20, 1938, after a hearing, the court so modified the decree as to permit defendant to visit the child at all reasonable times, etc., but refused to make any modification of the decree as to alimony and solicitor's fees.

Counsel for defendant contend in substance (1) that the decree awarding complainant a separate maintenance in the sum of $200 per month is erroneous because of insufficient findings in the decree, there being no certificate of evidence in the record; (2) that the award of $300 solicitor's fees is not sufficiently supported by the record, and (3) that that portion of the decree purporting to quiet title in complainant in the real estate therein mentioned is erroneous.

We do not think there is any merit in either of the first two points. The findings in the decree are sufficient in our opinion to sustain the separate maintenance awarded. It is not necessary to show the existence of statutory grounds for divorce in order to sustain a decree of separate maintenance. (Seelye v. Seelye, 45 Ill. App. 27, 34; Johnson v. Johnson, 128 Ill. 510, 515.) Furthermore, in the absence of a certificate of evidence, "the facts recited in the decree must be held to have been found by the chancellor upon sufficient evidence" (King v. King, 215 Ill. 109, 115); and "it will be presumed, in support of the decree, that the portions of the record omitted, if incorporated in the transcript filed here, would sustain the findings found in the decree." (Patterson v. Johnson, 214 Ill. 481, 494.) While it is not disclosed from the findings of the decree what the monthly income of defendant is, there is a finding that he is possessed of real estate valued at more than $180,000. It thus appears that he is a man of wealth and the award of $200 per month for the support and maintenance of complainant and the child cannot be considered as excessive. (Porter v. Porter, 168 Ill. 398; Billiette v. Billiette, 104 Ill. 122.) The amount to be awarded for solicitor's fees is in the discretion of the court (Johnson v. Johnson, 128 Ill. 510, 521; Aurand v. Aurand, 157 Ill. 321, 323); and we cannot say that the award of $300 in this case is unreasonable or excessive.

Counsel for defendant contend in substance (1) that the entire proceeding constitutes a separate litigation in the sum of $500 per month in excess of the amount of insufficient fees in the decree, there being no certificate of evidence in the record; (2) that the award of $500 solicitor's fees is not sufficiently supported by the record, and (3) that the provision of the decree prohibiting the wife from mortgaging the real estate during minority is invalid.

We do not think there is any merit in either of the first two points. The finding in the decree was sufficient to enable the appellate court to determine the propriety of the allowance. It is not necessary to show the existence of statutory grounds for divorce in order to sustain a decree of separate maintenance. (Bailey v. Bailey, 15 Ill. App. 97, 99; Johnson v. Johnson, 116 Ill. 626, 628.) Furthermore, in the absence of a certificate of evidence, "the facts recited in the decree must be held to have been found by the chancellor upon sufficient evidence" (Kline v. Kline, 246 Ill. App. 224); and "it will be presumed, in support of the decree, that the pleadings of the parties and, if introduced in the chancellor's final hearing, would sustain the findings found in the decree." (Johnson v. Johnson, 116 Ill. 626, 628.) While it is not disclosed from the findings of the decree that the monthly income of defendant is, there is a finding that he is possessed of real estate valued at more than $140,000. It does appear that he is a man of wealth and the award of $500 per month for the support and maintenance of complainant and the child cannot be considered excessive. (Martin v. Martin, 208 Ill. 396; Williams v. Williams, 204 Ill. 324.) The amount to be awarded for solicitor's fees is in the discretion of the court (Johnson v. Johnson, 116 Ill. 626, 628; Jarman v. Jarman, 187 Ill. 423); and we cannot say that the award of $500 in this case is unreasonable or excessive.

As to counsel's third point we think it is well taken. Four parcels of real estate, - three in Cook County, Illinois, and one in Los Angeles County, California, - are described in the decree. The court found that while the parties were living together as husband and wife the defendant purchased these lands and caused them to be conveyed to complainant. The court decreed that the title to these lands be "confirmed in said complainant as the owner thereof in fee simple." The bill does not show that she asked for this relief as to any of the parcels. She should be confined to the case made by her bill. (Russell v. Connors, 140 Ill. 660.) Furthermore, a decree of separate maintenance "is not necessarily a complete and final separation of the parties; the allowance is to the wife while they live separate and apart, and a reconciliation is contemplated; * * the allowance directed to be paid is not a final disposition of the property of the husband between himself and wife, but is, on the contrary, a temporary provision for her support elsewhere than in her husband's home until they are reconciled." (Spohr v. Braun, 197 Ill. App. 348, 352; 2 Nelson on Divorce and Separation, sec. 902; Decker v. Decker, 56 Mont. 338.) In the case last cited it is said (p. 346): "The judgment in a case of this kind does not alter the marital status, except in so far as it gives legal sanction to the wife's living separate and apart from her husband. It is not intended that such a decree shall effect a division of property, or shall in any way settle or determine the property rights of the parties; nor is it contemplated that the course of inheritance shall be changed. * * A reconciliation may be effected, and the marital relations resumed, and any decree which is made is subject to alteration or modification at any time. To sustain a decree such as the one under review would put it beyond the power of the court to make any further order in respect of the property affected by it."

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in an amicable joint policy in which it is well known, that persons of your nation, - there is no such thing, - and who is the joint tenant in the property, - interfering, - interfered in the divorce. The court knows that while the parties were living together in harmony and with the interests protected these lands not seemed them to be unvexed in complaints. The court's decree that the title to these lands be "quieted in such proceedings as the owner thereof in fee simple." The bill does not allege that the wife for this relief on the ground of the property, the claim be confined to the sums made by her bill. (Kennedy v. Dennery, 240 Ill. 600.) Furthermore, a decree of separate maintenance "is not necessarily a complete and final adjudication of the rights that the allowance is to the wife while they live apart and apart, and a reconciliation is contemplated; - - the allowance intended to be paid in lieu a final adjudication of the property of the husband between himself and wife, but is, on the contrary, a temporary provision for her support pending their separation and husband's home until they are reconciled." (Dodge v. Dodge, 197 Ill. 12, 14, 64 N.E. 1119; 2 Nelson on Divorce and Separation, sec. 1017; Hughes v. Hughes, 50 Mont. 488.) In the case here cited it is said (p. 504): "The judgment is a case of this kind does not affect the marital rights, nought is so far as it gives dower rights in the wife's living husband and heirs for her support. It is not contended that such a decree should affect a division of property, or should in any way modify or determine the property rights of the parties; nor is it contemplated that the decree of divorce should be obtained. It - - a reconciliation may be effected, and the marital relations renewed, and any decree which is made is subject to alteration or modification at any time. To sustain a decree such as the one under review would put it beyond the power of the court to make any further order in respect to the property affected by it."

Our conclusion is that the decree of the Circuit Court should be reversed in so far as it attempts to confirm title of the four parcels of land in complainant, but that it should be affirmed in all other resp cts, and that the cause be remanded to the Circuit Court for a modification of the decree accordingly, and it is so ordered.

REVERSED AND REMANDED WITH DIRECTIONS.

Fitch and Barnes, JJ., concur.

2 - 25021

J. M. CONNERY, Appellant, vs. PENNSYLVANIA RAILROAD COMPANY, a corporation, and THE PENNSYLVANIA COMPANY, a corporation, Appellees.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

This appeal is from the dismissal on defendants' motion of an action for damages to a shipment from Salisbury, Maryland, to Cleveland, Ohio, via the lines of defendant companies or their agents, in the months of February and March, 1917.

It appears from the declaration that the plaintiff acquired the right of action by assignments from the shipper at the former point, and the consignee at the latter place in July and June, 1918, respectively.

Defendants' motion was predicated upon general orders 18 and 18A of the Director General of Railroads prescribing the venue of suits against carriers while under Federal control. While appellant questions their constitutionality the point need not be discussed, the powers of the Director General in that regard having been upheld by the Supreme Court of the United States. (Alabama & Vicksburg Ry. Co. v. Journey, 257 U. S. 111.) These orders were issued on April 9 and April 18, 1918, respectively. The suit was begun July 22, 1918, and dismissed August 30, 1918. During all this time defendants' lines were under Federal control, and general order 18A continued in effect. Omitting certain recitals general order 18 reads as follows:

"It appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions or supplies are required to leave their trains and attend court as witnesses and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days, and sometimes for a week or more; which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads; and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs:

"IT IS THEREFORE ORDERED, that all suits against carriers while under Federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose."

General order 18A amended general order 18 by substituting for the words "where the plaintiff resides" in the ordering part the words "where the plaintiff resided at the time of the accrual of the cause of action." An affidavit in support of defendants' motion to dismiss set up that a proper presentation of their defense would require producing witnesses far remote from the place where the persons alleged to have been damaged at the time the alleged cause of action arose, and that the effect would be such as is stated in said recital in general order 18.

It also appeared from testimony taken on the motion and such affidavit, and the counter affidavit of plaintiff, that the latter resides in Chicago, that the shipper resided in Maryland, and the consignee in Ohio.

Plaintiff stresses his right under section 18 of the Illinois Practice Act to sue as assignee. But plaintiff can claim under section 18 of the Practice Act no greater rights than his assignors had at the time of the assignment (Smaigm v. Illinois Central R. Co., 180 Ill. App. 363; Eaves v. Chicago, Burlington & Quincy R. Co., 200 id. 380) and if their assignment was in contravention of the intent and purpose of said orders his claim to a right of action in his name would avail him nothing if the suit

"It appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states not particularized for results from the place where plaintiffs reside or where the cause of action arose; the effect thereof being that upon assuming the trains crossed in Illinois, the carriers, railroads or agents of such lines are compelled to defend their interests and rights and appear in a state far distant from their home, and, consequently, for convenience from their trains, or agents, and witnesses, it is a matter of great inconvenience to defendants, and the just interests of plaintiffs:

"It is therefore ordered, that all suits against carriers which arise under Federal Control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose."

Several other Illinois courts have interpreted similar in an attempt to the words "where the plaintiff resides" in the statutory part for the words "where the plaintiff resided at the time of the commencement of the cause of action." An affidavit in support of defendants' motion to dismiss set up that a proper presentation of their defense would require direct witnesses for roughly from the place where the persons claimed to have been damaged, at the time the alleged cause of action arose, and that the effect would be such as to state in such initial is general error.

It also appeared from statements taken on the motion and made affidavit, and the number of injuries at plaintiff, that the latter resides in Illinois, that the injury resulted in Illinois, and the witnesses in Ohio.

Plaintiff exercise his right under section 16 of the Illinois Practice Act to sue in contract. The plaintiff can claim under section 15 of the Practice Act to prevent rights from his assignors but in the claim of the assignment (Jenkins v. Illinois Central R. R., 221 Ill. App. 1921; Jones v. Illinois Central R. Co., 1. Ill. 24, 1941) and if these assignment was in contravention of the laws and purpose of said orders his claim is a right of action in his own would with the waiving if the suit

could not be brought in Illinois. The main question is to whom did the word "plaintiff" in the general order refer.

Unquestionably the order should receive such construction as would carry out its evident intent and purpose. One of the evident purposes of the order was to prevent the bringing of such a suit in a remote jurisdiction from the place where the cause of action arose and to require it to be brought where it accrued or "where plaintiff resided at the time of the accrual of the cause of action." This latter clause was substituted in the amended order for the words "where plaintiff resides," thus indicating, we think, the person to whom the cause of action accrued. Otherwise the injured party by assigning his cause of action to one in a remote jurisdiction or by changing his residence to the same might bring his action there and thus subject the government to all the inconveniences and interferences which the orders manifestly sought to avoid. Without undertaking to review them we think this construction is in harmony with the decisions of the Supreme Court of the United States giving liberal construction to legislation which conferred powers upon the government to meet emergencies and necessities growing out of the recent great war.

The cause of action arose outside of Illinois and to a party residing either in Maryland or Ohio. The bringing of the suit, therefore, was in our opinion, a violation of said amended order.

It was charged in defendants' affidavit that the suit was brought with the intent of evading and circumventing said orders, and while plaintiff claimed that the cause of action was transferred to him in payment of attorneys' fees due from the consignee he did not deny the direct averment charging him with such intent. It is clear that before the

would not be brought to illinois. The main question is to what did the term "neutrality" in the Lincoln Aims refer.

Unquestionably the order issued involved such commitments as would carry out the relations between and patrons, one of the salient features of the order was its growth the building of such a body in a remote jurisdiction from the place where the seat of action lower had to decide it so be brought where it usurped the local jurisdiction vested in the time of the accused of the house of "Lions." This is why Lincoln was adamant in the months prior to the more "more elaborate position," than indicating, or hinted, the person to whom the order of action lessened. Otherwise the injured party by assigning his cause of action to one in a remote jurisdiction or by charging his evidence in the case might bring his action there and thus subject the government to all the inconveniences and interferences which the orders multiply sought to avoid. Lincoln undertaking to prove than we think this construction is in harmony with the relations of the various bodies of the United States giving liberal construction to legislation which involved powers upon the government to meet emergencies and necessities growing out of the recent great war.

The cause of action under authority of Illinois was in a party residing either in Maryland or Ohio. The bringing of the suit, therefore, was in our system, a violation of law, amended order.

It was during in defendants' affidavit that he made his brought with the issues of trading and transporting said claims, but while plaintiff claimed that the cause of action was transferred to him in payment of attorneys' fees from the counsel, he did not deny the direct evidence charging him with such intent. It is clear that before the

assignment was made the action could not have been brought in Illinois without a violation of such orders, and it is significant that the cause of action was not assigned for over a year after it accrued and not until after said orders were in force, and then to one in a remote jurisdiction from where it accrued. These circumstances and the failure of plaintiff to directly deny the charge of evading such orders lent sufficient support to the charge, in our judgment, to justify the court in dismissing the cause of action regardless of the construction put upon the orders.

For the reasons stated the order of dismissal is affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

analogously one sees the action would not have been thought in Illinois without a violation of such statute, and it is objectionable that the course of action was not analyzed for more a year after it by counsel and not until after civil suits were in court, and then by one in a court in jurisdiction from which it removed. These circumstances and the failure of plaintiff to directly deny the charge of conduct such evidence lack material relevant to the charge, in our judgment, so justify the court in disregarding the sworn of action representations of the corporation and some the evidence.

For the reasons stated the order of dismissed is affirmed.

Affirmed.

Bridges, P. J., and Tilson, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO
vs.	CRIMINAL COURT,
FRED MADER, Plaintiff in Error.	COOK COUNTY.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff in error Mader and one Foster were indicted for a conspiracy with other persons whose names were to the grand jury unknown, to do certain illegal acts. A severance having been allowed, Mader was put on trial and found guilty as charged in the indictment, the jury fixing his punishment at a fine of $1,000 and one year in the penitentiary.

The indictment contained six counts, some of which are based on section 46 of the Criminal Code and some on the common law, charging a conspiracy to injure the business of the Whitestone Company, and also the business of the Women's Exchange; also a conspiracy to cheat and defraud the latter; also a conspiracy to induce laborers in the employ of the Whitestone Company, a corporation, upon a certain building to refuse to work upon the same for said company and to boycott the company in the employment of laborers thereon unless the Woman's Exchange, a corporation, which had a contract to furnish lamps for said building, would pay and deliver over certain sums of money. As the counts are set out at great length and with much superfluity, and as their sufficiency is not questioned, we need not set forth the charges with technical or greater particularity.

The building in question, The Drake Hotel, was owned by the Whitestone Company. The firm of Marshall & Fox, architects and engineers, was engaged to construct the same, and Foster was its superintendent of construction. Mader was the business agent of the Fixture Hangers' Union. The Woman's Exchange, a charitable organization, of which Mrs. Narcissa Thorne was vice-president, was given the contract to furnish about two thousand lamps for the hotel. Of these 612 were for desks and 612 for bedside lamps in the bedrooms. The Woman's Exchange had these bedroom lamps wired by nonunion labor, and they were stored in a warehouse awaiting the time for installation. Subsequently complaint was made that they did not conform to regulations of the Fixture Hangers' Union, and on November 8, 1920, a strike was called on the building resulting in a suspension of any installation of lamps on the inside of the hotel and other work until November 22, 1920, when the matter was adjusted as hereinafter stated. The charge of the union was that the lamps were "unfair," which in the parlance of labor unions means "that material in its character or handling or fabrication is not in compliance with the rules of the union." The unfairness in this case consisted of the handling and fabrication by nonunion labor.

The first that Mrs. Thorne seems to have heard of trouble on that ground was by a telephone conversation with Foster in which he said the lamps were "unfair," faulty in construction, and a strike would be called on that account, and wanted to see her about it. There is no pretense that Foster was connected with the union or had any power with reference to calling a strike. What he then said was inferably what he had been told by Mader. Thereupon he came to her office with two lamps, a sample of each kind of the bedroom lamps. The record does not disclose what was said further than that Mrs.

The building in question, the larger hotel, was owned by the Victorian Railways. The firm of Kingwell & Fox, architects and engineers, was engaged to remodel the same, and there was the usual misunderstanding of construction. During the training years of the Labour Dangerfield Cabinet. The Premier's Department, a disciplinic organisation, of which Sir, Harrison Thorne was vice-president, was given the contract to furnish about two thousand lamps for the hotel. Of these 600 were for chairs and 400 for portable lamps in the bedrooms. The Premier's Department has thrice between lamps called by nonunion labor, and they were stored in a warehouse awaiting the time for installation. Subsequently complaint was made that they had not contrary to regulations of the Fitters Company Union, and on November 9, 1920, a strike was called on the building resulting in a suspension of any installation of lamps on the hands of the hotel and other work until November 22, 1920, when the strike was adjusted by conciliation state. The charge of the union was that the lamps were "unfair," which in the language of labor unions means "that anything in its direction or handling or fabrication is not in consistency with the rules of the union." The authorities in this case consisted of the building and fabrication by nonunion labor.

The first that Mr. Thorne seems to have heard of trouble on that ground was by a telephone conversation with Foster in which he said the lamps were "unfair," really in construction, and a strike would be called on that account. and wanted to see Mr Thorne about it. There is no pretense that Foster was connected with the union or had any power with reference to calling a strike. That he then made use intentionally that he had been told by Kinder. Thereupon he went to Mr Kinder with the lamps, a sample of each kind of the Victorian lamps. The reports have not disclosed what was said further than that Mr.

Thorne told him that she would have the lamps rewired by union labor. A few days later she, Foster, and Mr. and Mrs. Drake (who were interested in the hotel) met Mader and two persons referred to as "two associates" at the construction shack near the hotel. In the interview or conversation there Mrs. Thorne told Mader that she would have the lamps rewired by union labor, but that to pay "any fine or anything" would be a hardship to the Woman's Exchange as it was a charitable organization. Just how Mrs. Thorne learned that a so-called "fine" was to be imposed does not appear. Nor in view of subsequent developments is it essential. Afterwards she had several conversations with Foster upon the matter in one of which he informed her that the strike had been called and work stopped on the entire construction of the Drake Hotel, owing to these lamps. She then consulted one Durgan, an attorney, who went to see Foster and had several conversations with him relative to the matter. Foster told him that the strike had "crystalized, and nobody seemed able to get anywhere," and wanted to know what he could do about it. Durgan replied that he did not know but was willing to try to help Mrs. Thorne. He asked Foster who was responsible for the strike, and he said "Mader" and that "Mader wanted $2000 to let the job go on," and that Fox "would not pay a cent." Durgan then went to see DeClercq, Construction Superintendent of the Commonwealth Edison Company, about the matter, who sent for Mader about November 15, 1920. The latter told DeClercq that he called the strike on account of the lamps furnished by the Woman's Exchange, and in answer to a question why he pressed this case against the Woman's Exchange, a charitable organization, said that the "matter had been brought up on the floor of the organization" and he could not call it off. DeClercq suggested as a "legitimate" way out of it that the lamps be rewired by a contractor hiring Union Fixture Hangers. After a few moments silence Mader said: "Let me know who does the work," and later

Thorne told him that one would have the Jumpe received by union labor. A few days later she, Porter, and Mr. and Mrs. Brooke (who were interested in the hotel) met Porter and the property referred to as "the moonlaker" - the construction shack near the hotel. In the interview or conversation there was Porter that the small bare the Jumpe received by union labor, but that to pay "any fine or anything" would be a hardship to the Jumpe's finances as it was a charitable organization. Just how Mrs. Thorne learned that a so-called "fine" was in the hopper does not appear. Her in view of subsequent developments it is meaningful. Otherwise she had several conversations with Porter upon the matter in one of which he informed her that the stable had been called and work stopped on the entire construction of the Jumpe hotel, owing to Thorne Jumpe. She then consulted one Jurgen, an attorney, who went to see Porter and had several conversations with him relative to the matter. Porter told him that the stable had "overbalanced", and nobody seemed able to get anywhere, and wished to know what he could do about it. Jurgen replied that he did not know but was willing to try to help him. Thereupon he asked Porter who was responsible for the stable, and he said "Mike" and that "Mike" wanted Jerome to let the job go on," and that for "would not pay a cent." Jurgen then went to see Jerome, Lawsonville superintendent of the Commonwealth Felons Company, about the matter, who went for Mike Porter Jerome. Jerome, Jurgen, Porter told Jerome that he called the stable on account of the Jumpe furnished by the Jumpe's Jumpe, and in order to a position why he pressed this case against the Jumpe's Jumpe, a charitable organization, said that the "matter had been brought up on the floor of the organization" and he would not call it off. Jerome suggested to a "Legislator" say out of it that the Jumpe be received by a mortgage holding Union Fidelity Company. After a few minutes silence Porter said: "Let me know who does the work," and later

called with one Hagan, suggesting that he do it. DeClercq in the meantime had made an arrangement with Mr. Best, of Henkel & Best Company, manufacturers of electric light fixtures, for his firm to rewire 1400 lamps at ninety cents per lamp, and a few extra lamps at $1.10 per lamp.

Best testified that after his talk with DeClercq between November 18th and 22nd, he had a talk at his factory with Nader about the price of the lamps and agreed to do 609 of them for $668. Nader was to furnish men to do the work. Nader told him that he wanted $750, that Best was going to "get $1418 from Mrs. Thorne to do the work," and that he could tell Mrs. Thorne when she paid $750 the strike would be called off. Nader then told Best he would call up and find out if he got the money and make an appointment to meet him. On November 22nd Mrs. Thorne and Burgan went to the office of Henkel & Best Company, handed Henkel $1418 and received a receipt therefor, written out by Burgan and signed by Best, who came forward and took the money and handed it to the bookkeeper. She took out $668 as the money coming to the firm and placed the $750 in a drawer. The receipt reads as follows:

"11/22/20

RECEIVED from Woman's Exchange, Chicago, Fourteen Hundred and Eighteen Dollars, in full payment for re-wiring, with union help, 612 electric lamps, and for clearance of 1460 lamps from union labor prohibition.

HENKEL & BEST CO.
By H. A. Best, Pres."

About two hours afterwards Nader came into the office and walked to a rear room followed by Best. Another party accompanied Nader, whom he told to stay in the front room. When Nader came in he asked "Where is the jack?" In the rear room he asked Best whether "everything was fixed up." Best said he had the money, returned into the front room, got it from the bookkeeper, went back to the rear room and gave it to Nader.

called with one degree, suggesting that he be 1st. Decisions in the meetings had made an arrangement with Mr. Ruth, of Ruth's Best Company, manufacturers of electric light fixtures, for him to receive 1400 lamps at ninety cents per lamp, and a few extra lamps at $2.50 per lamp.

Just before that after his talk with Dolliver between November 15th and 18th, he had a talk at his factory with Ruder about the price of the lamps and agreed to do 800 of them for $600. Ruder was to furnish men to do the work. Ruder told him that he wanted $700, that Ruth was going to "get $1100 from him. Tarter is in the work," and that he could wait. Tarter then the year 1910 the strike would be called off. Ruder then tell Ruth he would call up and find out if he got the money and make an appointment to meet him. On November 17th Ruder and Morgan went to the office of Ruder & Ruth Company, located Ruth Bldg and rented a private Office, without out by Morgan and signed by Ruth, the note figured and that he money and handed it to the bookkeeper. The book put $600 in the money member to the firm and placed the $700 in a drawer. The receipt reads as follows:

"RECEIVED FROM Ruder's Building, Chicago, Illinois, Hundred and Eighteen Dollars, in full payment for re-wiring, with 800 Mazda lamp, all electric lamps, and for electricity of light lamps from union labor product.

MORGAN & RUDER CO.
By H. A. Ruder, Pres."

About two hours after Ruder came into the office and waited in a room room followed by Ruth. Another party accompanied Ruder, when he told to stay in the front room. Then Ruder came in he asked "Where is the job?" In the rear room he asked Ruth whether "everything was fixed up." Ruth said he had the money, returned into the front room, put it from the bookkeeper, went back to the rear room and gave it to Ruder.

who then said he would go to the telephone immediately and call off the strike. He telephoned but Best did not hear what he said. The strike, however, was called off and work resumed on the building the next day.

No work had been done by Henkel & Best Company on the lamps up to that time. They were still in storage. Afterwards the firm of Henkel & Best Company fixed over only 588 or 590 of them. No others were delivered to them.

It appears that at a time not shown Durgan told Foster that he had arranged to have something like 600 lamps delivered to Henkel & Best Company for work to be done on them, and the "balance of them to remain at the hotel or in storage," and that the "balance would be passed," meaning, "having the union label put on them." Foster expressed a desire to have the matter hastened as much as possible because they wanted the hotel to open on the 25th, and he wanted to know if the strike would be called off the next day and whether the men would be put back on the work. Durgan thought they would be, or as promptly as the lamps were delivered back to the hotel so that the wiring could be done.

It is urged for grounds for reversal (1) that the State failed to prove a conspiracy either between Nader and Foster, or Nader and any party whose name was unknown to the grand jury; (2) that there was error in the admission of testimony; (3) that the argument of the State's attorney was prejudicial; (4) that there was error both in giving and refusing instructions.

The argument on the first point urged for reversal does not seek to excuse the conduct of Nader in the foregoing transactions or to question that if anyone actively participated with him in the same it would be a conspiracy such as is charged in the indictment or some of the counts thereof. But the contention is that the evidence does not show that Foster or any party whose name was

who then would be worth so in the telegraphic immortality and will not the crystal. He telegraphed but there did not have what he said. The crystal, however, was called off and were removed as the telegraphing the most day.

The work had been done by Bonfort & Bent Company in the large or to what time. They were still in mourning. Intervening the film of Bonfort & Bent Company Fined even only 50 to 20 or time. He others were delivered to them.

It appears that at a time not above August 20th Bonfort that he had arranged to have something like 200 lamps delivered to Bonfort & Bent Company for work to be done on them, and the "balance of them to remain at the hotel or in storage," and that the "balance would be pressed" meaning. Having the order label put on them." Fraser mentioned a display to have the matter hastened as much as possible because they wanted the hotel to open on the 25th, and he wanted to know if the crystal would be called off the next day and the time the lamp would be ready. Bonfort thought that would be, or as promptly as the lamps were delivered back to the hotel as that the crystal would be done.

It is urged for grounds for reversal (1) that the Trade Failed to prove a conspiracy either between Baker and Bonfort, or Baker and any party whose name was unknown to the grand jury; (2) that there was error in the admission of testimony; (3) that the argument of the state's attorney was prejudicial; (4) that there was error both in giving and refusing instructions.

The argument on the first point urged for reversal does not seem to assume the ownership of Baker in the forwarding instructions or to question that if anyone intentionally participated with him in the act it would be a conspiracy such as is charged in the indictment or some of the counts thereof. But the contention is that the evidence does not show that Fraser or any party other than the

unknown to the grand jury was a member of such a conspiracy.

While we think the evidence disclosed a conspiracy we are disposed to agree with the contention that the evidence is insufficient to show that Foster was a member of it. The claim that he was is predicated mainly upon the fact that he first informed Mrs. Therne that the lamps were "unfair" and that there would be a strike on account of them, and upon his conversations aforesaid with her and Durgan about the matter. But we find nothing in what he did or said that can be characterized as active participation either in tying up the construction work over which he was superintendent for the firm that would be injured by it, or in the design to extort money from the Woman's Exchange as a condition of resuming the work of construction. It was manifestly to his interest as an employe of Marshall & Fox, the builders, that the matter of the lamps be so adjusted that there would be no strike, or, if one, that the work be speedily resumed. The part he took, as disclosed by the evidence, is perfectly consistent with a lawful adjustment; or if he knew of the terms, with a passive acquiescence in the matter. There was no evidence to show that he had any previous knowledge of the terms of the settlement or actively participated in bringing it about.

But we think the evidence showed a conspiracy with others. The witness Best said on cross examination when asked why he paid Mader $750, "I don't know what I paid him for, you will have to ask him." It is perfectly obvious from his account of the more or less secretive arrangement for paying the $750 that he knew the money was not paid for any work to be done on the lamps but solely for tribute or "graft" money exacted by Mader as agreed upon between him and somebody, whereby the "balance" of the "unfair" work was to be "passed" and the strike called off. Certain links of the conspiracy may be supplied

evidence to the grand jury was a member of such a conspiracy.

Did we think the evidence indicated a conspiracy we are directed to agree with the motion that the evidence is insufficient to show that Porter was a member of it. The claim that he was predicated mainly upon the fact that he first introduced Lee. Thence that the Lamps were "stolen" and that there would be a profit on account of them, and upon his conversations otherwise with Ker yet longer about the matter. But we find nothing in them in fact or rule that can be considered as active participation either in trying up the conversation upon which he was indictable; for the film that would be injured by it, or in the design to extract money from the woman's husband as a condition of resuming the work of connivance. It was particularly in his interest as an employee of Lowenfell & Son, the jailers, that the matter of the lamps be so adjusted that there would be no trouble, or, if not, that the work be speedily resumed. The part he took, as disclosed by the evidence, is perfectly consistent with a lawful adjustment; or if in keep of the terms, with a passive acquiescence in the matter. There was no evidence to show that he had any previous knowledge of the terms of the settlement or actively participated in bringing it about.

But we think the evidence showed a conspiracy with others. The witness Ker said on cross-examination when asked why he paid Lucy (?)W, "I don't know that I paid him for, you will have to ask him." It is perfectly obvious from his account of the move on Lee's secretive arrangement for paying the (?)W that he knew the money was not paid for any work to be done on the lamps but solely for relinquishing or "profit" money secured by Lucy on account upon between him and Lowenfell, whereby the "salvage" of the "salvage" work was to be "passed" and the article called off. Certain items of the expenditure may be supplied

by legitimate inferences. It does not appear how Best or his bookkeeper knew $750 were to be taken out of the $1418 for Mader. But it implied a previous arrangement to that end, and while Best's arrangement with DeClercq was on the basis of a price for 1400 lamps he subsequently agreed, not with the Woman's Exchange or anyone representing it, but with Mader to rewire only about 600 at the price of $668, and was apprised at that time by Mader, who by some means undisclosed had evidently effected an arrangement therefor with or through somebody, that the Woman's Exchange would pay $1418, of which Mader was to have $750. It can hardly be questioned that Best, if not some others named in the case, not only acquiesced in the arrangement for levying this unjust tribute on the Woman's Exchange, but facilitated its consummation. Whether DeClercq or Menkel understood this arrangement is less certain. The record does not disclose with whom or when the arrangements were made whereby Mader was to get $750. Evidently Mrs. Thorne and Burgen felt compelled to submit to this extortion in order to reach an adjustment whereby the goods of the Woman's Exchange would be accepted.

Nor does the evidence disclose just how far Mader was able to control the strike. He disclaimed the power to do so, for he said, "it had gone on the floor of the organization and he could not call it off," from which it may be inferred he did not have absolute control. But he was the agent both in ordering the strike and in calling it off. As a labor union has no authority to impose a fine or penalty for violation of its rules on others than its members it presumably would not attempt as an organization to exercise it. It is too much a matter of public knowledge, however, to be ignored that its agents sometimes avail themselves of a strike to exact money, not for the union or to promote its cause, but for division among themselves. It is inferable from Mader's evidence that the union had to take action

by Sacramento informers. It does not appear has been or his bodyguard been [illegible] were to be taken out of the [illegible] for Grant, but it implied a previous arrangement to that end, and while Grant's arrangement with Sacramento was on the basis of a price for 3000 lumps by subsequently agreed, and with the Union's leverage or anyone representing it, but with Mader to receive only about 800 as the price of [illegible], and was explained at that time by Mader, who by some means unknown had evidently effected an arrangement therefor with or through somebody, that the Union's leverage would pay [illegible], of which Mader was to have [illegible]. It was hardly to questioned that that, if not some other means in the case, not only acquainted in the arrangement for keeping this [illegible] Sacramento as the Union's leverage, but facilitated the communication. Whether Sacramento or Mordy undertook this arrangement is less certain. The Union's dealings with them or with the arrangements were more shortly Mader was to get [illegible]. Probably Mr. Thorne and Morgan felt compelled to submit to this extortion in order to reach an agreement whereby the goods of the Union's leverage would be accepted.

But does the evidence disclose just how far Mader was able to control the strike. He disclaimed the power to do so, for he said, "It had gone on the floor of the organization and he could not call it off." From which it may be inferred he did not have absolute control. But he was the agent both in ordering the strike and in calling it off. As a labor union has no authority to impose a fine or penalty for violation of its rules on a member, it probably would not attempt to do so. It is too much a matter of public knowledge, however, to be inferred that its agents sometimes avail themselves of a strike to extort money, not for the union or to promote its cause, but for division among themselves. It is inferable from Mader's evidence that the union had to take action

on the matter before he could exercise any authority with reference to it and that others than himself had to know the terms of settlement whereby the strike would be called off. But that any particular members of the union knew of the arrangement for the adjustment does not appear. When Nader had his conference with Mrs. Thorne, Foster and Mr. Drake he was accompanied by two "associates," but the extent of their knowledge or participation in a concerted plan does not otherwise appear. When Nader, however, went to the office of Henkel & Best Company to get the money, which he was evidently informed was there, for he asked to be called up when it was paid and appeared at the office within two hours of the time the payment was made and immediately asked for "the jack," he was accompanied by another person whose name was not disclosed but whose presence on that occasion was significant. There was evidence that Nader said he had "split up" the money he received, but this evidence was stricken out and, therefore, is not properly a part of the record. But when we consider that Nader was acting in a representative capacity in calling and settling the strike we think it may be inferred that some of those with whom he had to deal with respect to the exercise of his authority as business agent of the union were cognizant of the terms upon which the adjustment was to be made, and assented to the continuance of the strike until it was consummated. That these terms were not for the benefit of the union or such as the organization itself would prescribe can hardly be doubted. The alleged ground for the strike was to prevent the use of "unfair" material in the building on which the union was employed to work. Nader seemingly assented to DeClercq's plan that it would be satisfactory if the 140 lamps were rewired by union labor. He nevertheless consented to pass "unfair" material, evidently in disregard of the union requirements, if a tribute of $750

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on the matter before he would consider any action in connection with intervene to it and that others than himself but in know the terms of settlement whereby the strike would be settled. But this any particular members of the union knew of the arrangement the the adjustment does not appear. Then Baker had his conferences with Ken. Thereon, Fenton and Mr. Drake he was accompanied by the "associates," but the extent of their knowledge or participation in a connected plan does not otherwise appear. Then Baker, however, went to the office of Kendal & Dent Company to put the money, which he was evidently informed was there, for he asked to be called up when it was paid and appeared at the office within two hours of the time the payment was made and immediately asked for "the job," he was accompanied by another person whom the not disclosed but whom evidence on that occasion was illegible. There was evidence that Baker also had "spoke up" the money to receive, but this evidence was stricken out and, therefore, is not properly a part of the record. But when we consider that Baker was acting in a representative capacity in calling and settling the strike we think it may be inferred that some of those with whom he had to deal with respect to the contents of his authority as business agent of the union were cognizant of the terms upon which the adjustment was to be made, and assented to the continuance of the strike until it was consummated. That these terms were not for the benefit of the union or such as the organization itself would provide can scarcely be doubted. The alleged reason for the strike was to prevent the use of "scabbed" material in the building in which the strike was employed. Baker accordingly suggested to McClerney's plan that it would be satisfactory if the lace lumber were replaced by union labor. He nevertheless consented to place "scabby" material, evidently in disregard of the union requirements, if it helped at the

was paid. It may be inferred, therefore, that it was not to enforce the union requirement of excluding "unfair" work on a building on which its members were employed, but to extort money because of its use that the strike was called and maintained until it was paid, with resultant injury both to the Whitestone Company, the owners of the building, and the Woman's Exchange. Such a conspiracy was unlawful. (People v. Blumenberg, 271 Ill. 180.) From these circumstances we think the jury might legitimately infer that Mader was not acting alone and could not well do so without the cooperation of others unnamed and unknown, so far as the evidence shows, whereby he controlled the situation of the strike.

But if the evidence does not support the inference of complicity by unknown persons with Mader, there is sufficient authority for holding that the descriptive term "unknown" is applicable to the witness Best. The record does not show that the incriminating part he played in the conspiracy was told to the grand jury or that it knew of it. The fact that it was revealed to the trial jury is no indication that it was known to the grand jury. In the absence of an affirmative showing to the contrary it may be inferred that the grand jury had no knowledge of it, else they would have named him, if not as a defendant, as one of the parties to the conspiracy. This conclusion is supported by the reasoning in People v. Smith, 144 Ill. App. 129, 158; 239 Ill. 91; Cooke v. People, 231 Ill. 7, 17.)

As alleged error in the admission of testimony the declarations of Foster to the effect that Mader was responsible for the strike and "wanted $2,000 to let the job go on," and that "Fox would not pay a cent," are referred to. The claim is that Foster not being a member of the conspiracy his declarations

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was paid. It may be inferred, therefore, that it was not in anticipation the union representatives of evaluation "without such as building on which the members were engaged, but to defraud money because of its use that the airline was making and paintings until it was paid, with permission being given to the defendants company, the owners of the building, and the tenant's mortgage. Such a conspiracy was unlawful. (Lemmon v. Sloanecrete, 67 Ill. App. 2d.) From these circumstances we think the jury might logically infer that Bauer was an active member and would act well to do so without the cooperation of others concerned and unknown, so far as the evidence shows, whether he contributed the physical of the crime.

Due if the evidence does not support the inference of conspiracy by common purpose with Kahn, there is sufficient evidence for holding that the misdirected then "unknown" is applicable to the defendant Bauer. The record does not show that the incriminating part he played in the conspiracy was paid to the grand jury or that it knew of it. The fact that it was revealed to the trial jury is no indication that it was known to the grand jury. In the absence of an affirmative showing to the contrary it may be inferred that the grand jury had no knowledge of it, else they would have named him, if not as a defendant, as one of the parties to the conspiracy. This conclusion is supported by the statement in People v. Smith, 14 Ill. App. 129, 130; 328 Ill. 91; Lemmon v. People, 67 Ill. 9, 14.)

An alleged error in the admission of testimony the discussions of Trotter as the effect that Bauer was responsible for the strike and "warned (Kahn) to let the job go on," and that Kahn would not pay a cent," are referred to. The claim is that Trotter was being a member of the conspiracy his testimony

were inadmissible. That is true. But inasmuch as there was other competent and undenied testimony that Mader admitted to Best that he called the strike, and in fact received money "to let the job go on" and no attempt was made to deny these facts these declarations of Foster cannot reasonably be deemed reversible error. In fact the only attempt at a defense was to show that certain union laborers installed lamps during the period of the strike. But we need not discuss the evidence on that phase of the case, as it was sufficient to show the calling of a strike by Mader, the suspension of construction work by reason thereof for about twenty days, and the resumption of construction on the payment of the $750.

The alleged prejudicial remarks by an assistant state's attorney were with reference to the failure of defendant to call as witnesses certain persons who were with Mader on occasions above stated. The fact that they were known to him but apparently not known or accessible to the state's attorney distinguishes the facts of this case from those in People v. Munday, 280 Ill. 38, cited on this point. In fact what was said on page 42 of that decision with respect to the distinguishing feature alluded to brings the remarks complained of within the lines of proper comment.

Given instruction 5 is complained of because it included among the things the jury might consider in determining the weight of the testimony "all matters and facts and circumstances shown on the trial;" and reference is made to the case of People v. Terrell, 262 Ill. 138, and People v. Fox, 309 Ill. 304, where the court held that an instruction of that character which includes for consideration "the surrounding circumstances appearing on the trial" is too broad, and should be limited to the facts and circumstances appearing in evidence, which is the import of that part of the instruction complained of. It is in harmony with other instructions

very inadmissible. That is true. But inasmuch as there was other competent and unbiased testimony that Foley indicated to Jack that he called the strike, and he Jack received money from Jack the jack to do so, and no attempt was made to deny these facts (these declarations of Foley) cannot reasonably be deemed revertible error. In fact the only attempt at a defense was to show that certain unions laboring included large during the period of the strike. But we need not discuss the evidence on that phase of the case, as it was sufficient to show the calling of a strike by leaders, the suspension of construction work by reason thereof for about twenty days, and the resumption of construction on the payment of the $750.

The alleged prejudicial remarks by an assistant plaintiff's attorney were with reference to the failure of defendant to call as witnesses certain leaders who were with Jack at a meeting above stated. The fact that they were known to the jurymen may known or accessible to the state's attorney distinguishes the facts of this case from those in Pennie v. Bunkow, 280 Ill. 32, cited on this point. In fact what was said on page 42 of that decision with respect to the distinguishing features cited in bringe the remarks complained of within the lines of proper comment.

Given instruction 3 is complained of because it included among the things the jury might consider in determining the weight of the testimony "all matters and facts and circumstances shown on the trial;" and reference is made to the case of Ingoldsby v. Ingoldsby, 280 Ill. 128, and Pennie v. Kaw, 280 Ill. 32, where the court held that an instruction of that character with inclusions for consideration "the surrounding circumstances appearing on the trial" is too broad, and should be limited to the facts and circumstances appearing in evidence, which is the import of that part of the instruction complained of. It is in harmony with other instructions

expressly limiting the jury's consideration to facts and circumstances shown by the evidence.

The complaint against given instruction 12, which told the jury that "the fact of a conspiracy may be gathered and derived by the jury from the combined and concerted action of the alleged conspirators in the commission of the unlawful act charged" is that it assumed facts. We think not. It is an abstract statement which taken in connection with other given instructions on the subject of conspiracy correctly states the law.

Instruction No. 36 told the jury that no labor union has a "lawful right to levy a fine against a person not belonging to the union," etc. It is claimed that there was no competent evidence showing a purpose to levy a fine and, therefore, the use of the phrase was not warranted. Even so, the instruction was not misleading or prejudicial. The only application the jury could have made of it was with reference to the amount demanded as a condition of calling off the strike. The name by which it was called was immaterial for neither the union nor Meder nor anybody else had a right to exact payment of money under such circumstances and on such conditions.

Error is claimed in refusing instructions. Number 12 stated that Meder was not required to call any person as a witness, and that whether he called a witness or witnesses should not influence the jury. Evidently the instruction was drawn to fit such conditions as existed in the case of People v. Munday. While the first part of it is correct, the latter part which tells the jury they "should not be influenced whether he called a witness or witnesses," does not state the law, for, as also stated in the case of People v. Munday, on page 46 heretofore referred to, the jury may, where it is not within the power of the State but

expressly limiting the jury's consideration to facts and circumstances shown by the evidence.

The complaint against given instruction 11, which tells the jury that "the fact of a conspiracy may be inferred and deduced by the jury from the conduct and concerted action of the alleged conspirators in the commission of the unlawful act charged" is that it assumed facts. We think not. It is an abstract statement which taken in connection with other given instructions on the subject of conspiracy correctly states the law.

Instruction No. 25 told the jury that an labor union has a "lawful right to levy a fine against a person not belonging to the union," etc. It is claimed that there was no competent evidence showing a purpose to levy a fine and, therefore, the use of the phrase was not warranted. Even so, the instruction was not misleading or prejudicial. The only effect that the jury could have made of it was with reference to the amount demanded as a condition of calling off the strike. The term by which it was called was immaterial, for neither the union nor Rider nor anybody else had a right to exact payment of money with [illegible] and at such conditions.

Error is claimed in refusing instructions. Number 1 stated that Rider was not entitled to call any persons as witnesses, and that whether he called a witness the witnesses should not influence the jury. Evidently the instruction was aimed to fit such conditions as existed in the case of Smith v. [illegible]. While the first part of it is an excerpt, the latter part which tells the jury they "should not be influenced by reason of calling a witness or witnesses," does not state the law, for, as also stated in the case of [illegible] v. [illegible], on page 42 heretofore referred to, the jury may, where it is not within the power of the State but

within that of the defendant to call a witness to establish a controverted fact and the witness is not called, properly take the matter into consideration. The state of facts in the instant case justified the refusal of the instruction.

Refused instruction 32 seems to have been fully covered by other instructions given on behalf of both the defendant and the State, and therefore need not be discussed.

As to the instructions, we repeat what was said in People v. Haenssel, 293 Ill. 55, p. 42: "As a whole, they fully and fairly announce the rules of law applicable to the prosecution and the defense;" and as to them and other alleged errors, what is also there said, that "where it can be said from the record that an error complained of could not reasonably have affected the result of the trial the judgment of the trial court should be affirmed."

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

97 - 28373

HENRY W. PFANF, Appellee, vs. FRANK R. LACKOWSKI, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

Plaintiff, the appellee, filed his statement of claim alleging that at the instance and request of the defendant, the appellant, he procured various owners of buildings to give to defendant the business of collecting their rents, whereby plaintiff became entitled to a commission of "1% of total one year rent collection." The amount he claimed with interest was $155.75. A verdict for $132 was rendered in his favor, and the judgment appealed from was entered thereon.

As grounds for appeal appellant urges, first, that the verdict was against the preponderance of the evidence; and second, that secondary evidence of the amount of rents was improperly received.

With respect to the first contention appellant contends that the evidence brings the case within the doctrine laid down in Broughton v. Smart, 59 Ill. 440, that "A party holding the affirmative of a proposition is required to maintain it by a preponderance of evidence, which can never be the case when one of two parties, both equally credible, makes an assertion which is denied by the other. The plaintiff's case, under such circumstances, is not proved." This case has been frequently cited and followed in cases where the issue depended upon the affirmative statement by one witness categorically denied by another of equal credibility, and there was no im-

DUNCAN v. STATE, Appellant,	
vs.	SUPREME COURT OF THE UNITED STATES
PEOPLE ex rel. LEWISOHN, Respondent.	No. 2[illegible].

No. 2[illegible] Appeal from the Court of Appeals of the State of New York.

Plaintiff, the appellant, filed his statement of claim alleging that at the instance and request of the defendants, the appellants, he received various sums of money to give to defendant the business of soliciting bank loans. Thereby plaintiff became entitled to a commission of $[illegible] at least one year not exceeding." The answer to claims with interest was $[illegible]. A verdict for $[illegible] was rendered in his favor, and the judgment appealed from was entered thereon.

In argument for appellant appears, first, that the evidence was against the preponderance of the evidence; and second, that secondary evidence of the amount of trade was improperly received.

With respect to the first contention appellant concedes that the evidence bringing the case within the doctrine laid down in Brownlee v. Bunt, 24 Ill. 420, that "a party making the affirmative of a proposition is required to establish it by a preponderance of evidence, which can never be the case when one of two parties, both equally credible, makes an assertion which is denied by the other. The plaintiff's case, under such circumstances, is not proved." This case has been frequently cited and followed in cases where the issue depended upon the affirmative statement by one witness contradictorily denied by another of equal credibility, and there was no in-

peaching testimony or inherent improbability of the truth of the denial, or circumstances tending to refute it or to support the affirmative statement.

In the case at bar we think there were circumstances tending to support plaintiff's contention. Plaintiff was a building contractor for three apartment buildings, and testified that he procured for defendant the agency of collecting the rents from the same upon defendant's promise to pay him 1% of their total rental value for one year. Defendant denied making such promise. He, however, collected rents from the buildings and practically admits it was through the instrumentality of plaintiff that the owners of two of them came to his office to make the arrangement for such collection, and there is sufficient evidence, we think, to show that it was also through plaintiff's agency that the owner of the third building came to defendant for a similar arrangement. It appeared from plaintiff's evidence that he secured the tenants for one building before it was finished, and for that purpose obtained from defendant's office blank application slips and receipts for deposits made on such applications and turned in the deposits made on such applications to defendant's office. While defendant denied that he personally gave him the authority to let the apartments in that building, or directed the bookkeeper and rent clerk in his office to turn over such blank slips and receipts to him, and he and the bookkeeper testified that they did not see plaintiff bring in any of said slips from which the leases were prepared, yet it was not expressly denied that plaintiff was instrumental in procuring such tenants for defendant or that he presented their applications for leases and turned in deposits made thereon to defendant's renting clerk, with whom plaintiff claimed to have dealt, and who was not called to deny plaintiff's evidence. We think these circumstances

presenting testimony or indicated responsibility of the owner of the premises, or circumstances leading to infer it or to account the activities substantial.

In the case at bar we think there was substantial evidence to support plaintiff's contention. Plaintiff was a building maintenance for other independent contractors, and testified that he procured for defendant the service of soliciting the route from the same guys defendant's premises to pay the $2 of those bags every value for the year. Defendant denied ever making payments. He, however, admitted that the delivery had previously stated it was through the responsibility of plaintiff that the owners of one or two of them came to his office to make the arrangement for such delivery, and there is sufficient evidence, or that, to some fact it was also through plaintiff's agency that the owner of the local building came to arrangement for a similar arrangement. It appeared that plaintiff's witnesses that he secured the tenants for one building before it was finished, and for that purpose obtained from defendant's office blank applications which were left for signing by the tenants.

Applications was turned in the company made on such applications to defendant's office. Other witnesses testified that he was usually on the premises in their buildings in his capacity as janitor, or directed the housekeeper and porter clerk in his office to look over such blank signs and receipts to him, and to get the housekeeper testified that they did not see plaintiff bring in any of such slips from which the leases were prepared, yet it was not necessarily conclusive that plaintiff was instrumental in procuring such tenants to subscribe or that he procured their signatures to leases and turned in the completed work through to defendant's managing agents with some plaintiff's element in some doubt, and then was not called to carry plaintiff's evidence. In which there disagreements

justified the jury in inferring that plaintiff did not render such services voluntarily but upon an agreement as to compensation therefor, and therefore, in accepting his version of the same. Plaintiff testified, too, that his compensation was to be applied on a promissory note he gave defendant in a previous real estate transaction which fell due within three months. His contention, though denied, is somewhat strengthened by the fact that defendant retained it and did not attempt to take judgment upon it until nearly two years afterwards when the control of one of these buildings passed out of his hands into the hands of plaintiff.

Defendant was served with notice to produce his books showing the amount of rentals he had collected from the buildings. Failing to produce them he was asked for and gave the minimum average amount of the annual rentals from each building. One per cent of that minimum would amount to a few dollars more than the face of the judgment. Defendant complains that secondary evidence of the amount of such rentals was improperly received. The record discloses no objection to the questions and, therefore, appellant cannot complain of them here for the first time. Nor did he move to strike the answers.

We shall not undertake to detail further wherein the testimony was contradictory. Suffice it to say that we think there was sufficient evidence to justify the verdict, and that there was no reversible error.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

(82752)

159 - 28435

MATTHEW T. DUNN et al., Appellees, vs. PARISIAN NOVELTY COMPANY, Appellant.	APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE BARNES DELIVERED THE OPINION OF THE COURT.

All of the assignments of error argued in this case rest upon the bill of exceptions, which has been stricken on appellees' motion because not filed within 30 days of the entry of the judgment or within any extension of time allowed by the court within 30 days of the entry of the judgment, as required by section 23 of the Municipal Court Act. (Lassers v. North-German Steamship Company, 244 Ill. 570; Surlitzer Co. v. Dickinson, 247 id. 27.) Since, therefore, the errors complained of do not appear in the record the judgment must be affirmed.

AFFIRMED.

Gridley, P. J., and Fitch, J., concur.

11 - 27976

(327 a)

FANNIE LOFTUS, Administratrix of the Estate of Michael Loftus, Deceased, Plaintiff in Error, vs. CHICAGO RAILWAYS COMPANY, Defendant in Error.	ERROR TO CIRCUIT COURT OF COOK COUNTY.

28014-6674

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

This case, an action for damages for wrongfully causing the death of Michael Loftus, has been twice tried. In the first trial there was a verdict and judgment for $5000, which judgment was affirmed by this court but was reversed and remanded by the Supreme court because of prejudicial error in the admission of evidence, and because, in the temporary absence of the judge from the bench during the trial, the widow of the deceased wept in the presence of the jury. (Loftus v. Chicago Railways Co., 295 Ill. 475.) Upon the second trial the jury found the defendant guilty and assessed damages at the sum of one dollar. From the judgment entered on that verdict the plaintiff has sued out this writ of error, and contends first, that "the verdict is absurd" because of the alleged inadequacy of the damages awarded, and second, that some of the given instructions are erroneous. Defendant's counsel insist that under the evidence the verdict should have been not guilty and was, in practical effect, equivalent to a verdict of not guilty, and that therefore the plaintiff has no reason to complain that the damages assessed were merely nominal. Defendant's counsel further contend that if there are any errors in the instructions, they are harmless.

The facts as they appeared upon the first trial are very fully stated in the opinion of the Supreme court, supra.

Upon the second trial four alleged eye-witnesses testified on behalf of the plaintiff and eight on the part of defendant. The accident occurred at the intersection of Hoyne avenue and West 12th street in Chicago. Plaintiff's intestate was walking north along the west side of the Hoyne avenue intersection and was struck by one of defendant's street cars that was going east on West 12th street. Two of the plaintiff's witnesses and five of defendant's witnesses testified that they were on the front platform of the street car at the time of the accident. The two witnesses called by the plaintiff testified that when the plaintiff's intestate was two or three feet south of the street car track, and the street car was 50 to 75 feet west of him, they saw him "quicken his steps" or "take long steps" across the tracks ahead of the car. The five witnesses called by defendant testified that when he was about half way between the curb and the street car track and the car was 15 or 20 feet from him, they saw him look towards the approaching car, hesitate, and then run across the track directly in front of the car. He was hit by the left hand front corner of the street car. The only real difference in the testimony of these seven eye-witnesses to the accident is in their estimates of the exact distance between the street car and the plaintiff's intestate at the moment he started to hurry or run across the track, and in their estimates of the rate of speed of the street car at that moment. The five witnesses called by defendant who were on the front platform had the same opportunity to see and know these facts as the two witnesses called by the plaintiff. Such five witnesses do not appear to have been connected in any way with the street car company or interested in any manner in the result of the suit, nor were they impeached in any respect. On the other hand, the testimony of the two witnesses for the plaintiff above mentioned was discredited, to some extent at least,

by proof of prior contradictory statements, and the story told by them is inherently improbable. If their estimates of distance and speed are accurate, plaintiff's intestate ran a distance of about eight feet while the street car was going 60 to 75 feet; which means that during that time the street car was going eight or nine times as fast as he was running. This is possible, perhaps, but hardly probable, especially in view of the other evidence of these witnesses. The highest estimate of the rate of speed of the street car, given by either of them, was 21 miles an hour, and both of them testified that a number of persons were waiting at the south side of the car tracks about a car's length west of Hoyne avenue, to get on the car, that the car "slowed down" as it approached them, ran 25 or 50 feet at the rate of 12 to 14 miles an hour, and then, without stopping, "picked up speed" again as it passed that point. It is a matter of common observation that a man walking fast, as these witnesses say he was, travels at a rate of at least three miles an hour, and if the street car was going eight or nine times as fast, the average speed of the car while it was covering the intervening 60 or 75 feet, must have been at the rate of 24 to 27 miles an hour. Hence their estimates, either of speed or of distance, or both, must be wrong. The other two witnesses for the plaintiff were so situated that neither of them could see the circumstances of the accident as clearly as the witnesses on the front platform of the street car. One of such other two witnesses testified to an alleged state of facts that is clearly impossible, viz., that the street car was 200 feet away when Loftus stepped upon the south rail of the track; and the testimony of the other of such two witnesses was discredited by evidence tending to prove that he was not where he claimed to be at the time of the accident, and did not, in fact, see what happened, but came upon the scene after it occurred, and

also by proof to the effect that he or some member of his family had been injured in a street car accident, and was bitter towards defendant on that account. When all the facts and circumstances are considered, we see no escape from the conclusion that if the verdict is to be treated as a verdict in favor of the plaintiff, it is manifestly contrary to the clear preponderance of the evidence.

The question then arises, whether under such a condition of the record, it is our duty to reverse the judgment with a finding of facts, or treat the verdict as equivalent to a verdict of not guilty and affirm the judgment. Upon the oral argument, defendant's counsel stated that the defendant is willing that the latter course should be adopted; and it appears from the record that the trial judge took that view when he overruled the motion for a new trial. There is authority in this state and elsewhere in support of this practice, viz., that where it appears from the record that the plaintiff is not entitled to recover, a reviewing court will not require a new trial to be had merely because the verdict and judgment, as entered, were in favor of the plaintiff with nominal damages, but may affirm the judgment and thus end the litigation. (Minberg v. Kraus Kraus. Leery Co., 231 Ill. App. 648; Kiley v. Chicago City Railway Co., 189 Ill. 304; Hackett, Admr. v. Pratt et al., 52 Ill. App. 346; Click v. Farm Rock Woolen Mills, 180 Fed. 117.)

As to the instructions complained of, only one of such instructions refers in any manner to the question of damages. That instruction told the jury that before the plaintiff can recover she must prove the exercise of due care on the part of Michael Loftus, negligence on the part of defendant, and also that she "sustained pecuniary loss as a result of the accident." Plaintiff's counsel criticize this instruction on the alleged

ground that pecuniary loss to a widow is presumed from the death of her husband. No such presumption, however, arises from the mere fact alone of wrongful death, but it must be alleged and proved, if such is the fact, that the deceased left a widow to whose support he in his lifetime had contributed. There was such proof in this case; and there was no error in telling the jury that such proof must be made before the plaintiff could recover. The other instructions complained of relate only to the question of liability, and not to damages. As to such instructions, the argument of plaintiff's counsel is somewhat inconsistent, for if the verdict is to be treated as a verdict in favor of the plaintiff on the question of liability, then certainly plaintiff cannot complain of instructions that were given tending to induce a verdict of not guilty. However, we have examined all the instructions and are of the opinion that while some of them were involved and verbose, and some of the principles stated were unnecessarily repeated, there is only one - the fifth - that is questionable. We do not approve that instruction; but in the view we take of the evidence, as above stated, we can not see that the plaintiff was harmed by giving it.

For the reasons stated, the judgment of the Circuit court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

[illegible] that jurisdiction lies in a court in which the defendant is/[illegible] of/or resident. In such proceedings, however, unless [illegible] that class of employee's claim, it is hard to see [illegible] present, if such is the fact, that the deceased left a widow [illegible] appears to be his lifelong but unidentified. [illegible] most proof in this case; and there was no error in telling the jury that very grave work to make before the liability could result. The other instructions complained of relate only to the question of liability, not as to damages. As to such instructions, the argument of plaintiff's counsel is somewhat [illegible], for if the matter is to be treated as a verbal [illegible] Tests of the plaintiff on the question of liability, the [illegible] plaintiff cannot complain of instructions that were given solely to induce a verdict of not guilty. However, we have treated all the instructions and are of the opinion that [illegible] of them were invited not erroneous, and none of the [illegible] which were unnecessarily favorable to defendant - the jury - had to be overlooked. It is not argued that [illegible] but is the clear on face of the evidence, we [illegible] about it, or can not say that the plaintiff was harmed by giving it.

For the reasons stated, the judgment of the circuit court is affirmed.

AFFIRMED.

Brickley, J., C., and Dawson, J., concur.

31 - 28285

PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,	ERROR TO
vs.	CRIMINAL COURT,
	COOK COUNTY.
OTTO SEEFELDT and WILLIAM BRIMS, Plaintiffs in Error.	

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

Otto Seefeldt and William Brims, plaintiffs in error, hereinafter referred to as defendants, were convicted in the Criminal Court of conspiracy to injure the business of the Henry Busch Company, a corporation, by unlawfully preventing certain workmen employed in the construction of a building for said corporation in Chicago, from continuing their work on said building.

One William McCumber had the contract for the carpenter work on the building mentioned and employed union carpenters to do the work. One John McDonald had a contract for the millwright work and he also employed union men for that work. The defendant Brims was the president of the Carpenters' District Council of Chicago, which is a sort of governing body for the carpenters' union of Chicago and vicinity, and the defendant Seefeldt was the business agent of one of the local unions of carpenters. The District Council had a written agreement with the Carpenter Contractors' Association, an organization of employers, to which McCumber belonged, specifying in detail what should be considered as carpenters' work. Included in such specifications were the "fitting and hanging of sash, transoms and doors," and the "setting and erection of all metal-covered trim or doors." The agreement states that it is made "for the purpose of preventing strikes and lockouts, and facilitating a peaceful adjustment of

[illegible] OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

CITY [illegible] AND BUILDING TRADES,
Plaintiffs in Error.

[illegible] COURT OF
[illegible] CIRCUIT COURT,
[illegible] COUNTY.

Mr. Justice [illegible] delivered the opinion of the court.

CITY DIRECTORY AND BUILDING TRADES, plaintiffs in error, [illegible] referred to as defendants, were convicted in the criminal court of [illegible] to injure the business of the Jewel Company, a corporation, by unlawfully preventing workmen employed in the construction of a building for said corporation in Chicago, from continuing their work on said building.

The Building Director and the workmen for the corporation were in the building mentioned and employed union carpenters to do the work. The Jewel Company had a contract for the millwork work and he also employed union men for that work. The defendant Dreyer was the president of the Carpenters' District Council of Chicago, which is a part of Carpenters Half the corporation union of Chicago and vicinity, and the defendant Dwyer was the business agent of one of the local unions of carpenters. The District Council had a written agreement with the Carpenters' Contractors' Association, an organization of carpenters, to which Schuyler Salmon, qualifying in behalf that should be considered as carpenters' work. Included in such specifications were the "fitting and finishing of doors, frames and sashes," and the "setting and erection of all ready-glazed sash or frames." The agreement stated that it is made "for the purpose of protecting employes and employers, and facilitating a peaceful adjustment of

grievances and disputes which may from time to time arise between the employer and employees in this trade;" and provides "that there shall be no strikes, lockouts or stoppage of work without the sanction of the Joint Conference Board, of which the parties hereto are members;" that in the event of "any dispute or grievance" between the parties "for any cause whatsoever, there shall be no cessation or abandonment of the work on the part of either party to this agreement, or any of their members, individually or collectively, but such grievance or dispute shall be settled as provided for in Article 2, 8 and 11 of this agreement." Said Article provide for the submission of such disputes to the Joint Arbitration Board, who shall hear the evidence and decide the matter. The agreement also provides that the union "presidents and representatives * * * be allowed to visit jobs during working hours to interview the contractor, steward or men at work, but shall in no way hinder the progress of the work." This agreement, by its terms, was in force and effect from June 1, 1918, to May 31, 1921.

McCumber began work on the Bosch Building in February, 1920. The specifications for the work on the building required the installing of certain patented "cross-folding" or "jackknife" doors, made of wood, hinged in the middle, and fastened to metal jambs. McCumber sublet this part of his contract to a concern which manufactured such doors, and the subcontractor employed iron-workers to install them. In some way not shown by the evidence, the defendant Seefeldt learned of this, and a few days before July 20, 1920, he appeared at the building and told McCumber that the hanging of the doors was carpenters' work. McCumber replied that he had always before had such doors put up by iron-workers, and he thought it was their place to hang them. McCumber testified on the trial that he did not construe the agreement as covering the cross-folding doors. Some discussion ensued between them on this subject, and then McCumber suggested that he would have the

grievances and disputes which may from time to time arise between the employer and employees in this trade;" and provides "that there shall be no strikes, lockouts or stoppages of work without the sanction of the Joint Conference Board, of which the parties hereto are members;" that in the event of "any dispute or grievance between the parties "for any cause whatsoever, there shall be no cessation or abandonment of the work on the part of either party to this agreement, or any of their members, individually or collectively, for such reasons or disputes shall be settled or provided for in Article 5, 6 and 12 of this agreement;" that Article provide for the submission of such disputes to the Joint Arbitration Board, who shall hear the evidence and decide the matter. The agreement also provides that the union representatives and representatives of the employer are allowed in their jobs during working hours to investigate the complaints, stopped or men at work, but shall in no way hinder the progress of the work." This agreement, by its terms, was in force and effect from June 1, 1919, to May 31, 1922.

Robinson began work on the Dawes building in February, 1920. The specifications for the work on the building required the installation of certain patented "cross-ribbing" or "diamond" stone, made of wood, hinged in the middle, and fastened on metal frames. Robinson subletthis part of his contract to a concern which manufactured such doors, and the subcontractor employed iron-workers to install them. In some way not known by the evidence, the International Association of Iron, and a Tri-State Union, the Industrial Council Division of IWW, was a Tri-State before July 1, 1920, be organized at the building and this Association that the hanging of the doors was contractors' work. Robinson replied that he had always had such doors put up by iron-workers, and he thought it was their place to do so. Robinson instructed the foreman to let the job to the iron-workers, but the foreman informed the contractor that he did not consider the expense as covering the cross-ribbing work. Some discussion among Dawes foreman and the foreman, and then Robinson telephoned that he would have the

carpenters "apply the hardware to the doors," if Seefeldt would allow the iron-workers to do the rest of the work of hanging them. Seefeldt said that would be satisfactory. A day or two later, Seefeldt again called at the building and told McCumber that "his superiors" had overruled him in this matter and had decided that the hanging of these doors was carpenters' work and "they had to do it."

Soon after this the iron-workers came to the building to install the doors. When McCumber learned they were there, he sent them a special delivery letter, telling them "there was liable to be trouble between them and the carpenters," and asking them to stop until he could get the matter adjusted. The iron-workers, however, "refused to stop, but went right on." McCumber then arranged a meeting with Brims and Seefeldt at the building, on July 20, 1920. One Ryan, business agent of the iron-workers' union, was there, and the situation was talked over, each of the union representatives claiming that the work of hanging the doors belonged to his union. Finally Brimms said to Seefeldt: "Go ahead and pull the carpenters off," whereupon Seefeldt "called off" the seven or eight carpenters then working there for McCumber, and six millwrights who were then working there for McDonald, and all these workmen quit work at once.

McCumber then arranged a meeting at the office of Mundie & Jensen, the supervising architects. This meeting was held on July 22, 1920, at ten o'clock in the forenoon. Brims and Seefeldt came in together and were introduced to Mr. Mundie. Thereupon one of the architects' employes named Bourke, who apparently had direct charge of this work, said to Brims that he couldn't understand why a strike had been called; that the specifications had always theretofore required the doors to be installed by the "steel men," and the work had always been done that way; that

[illegible] "why the hardship in the dress," if workers could allow the iron-workers to do the rest of the work of hanging them. Herlihy said that would be revolutionary. A day or two later, Herlihy again called at the building and his company that "the supervisor" had overruled him in this matter and had decided that the hanging of these doors was superintendent's work and "they had to do it."

Soon after this the iron-workers came to the building to install the doors. Then Schneider learned they were there. He sent them a special delivery letter, telling them "there was liable to be trouble between them and the carpenters," and asking them to stop until he could get the matter adjusted. The iron-workers, however, "refused to stop, but went right on." Schneider then arranged a meeting with John Ohs, the [illegible] on July 30, 1930. One "Pete," business agent of the iron-workers' union, was there, and the situation was talked over, each of the union representatives claiming that the work of hanging the doors belonged to his union. Finally Ohs said to Pete: "We need you pull the carpenters off," whereupon Pete telephoned all the seven or eight carpenters then working there for Schneider, and at midnight the men were then working there for Schneider, all their women and [illegible] of [illegible].

Schneider then arranged a meeting at the office of Deadie & Jones, the supervising architects. This meeting was held on July 30, 1930, at ten o'clock in the forenoon. Prince and [illegible] came in together and were introduced to Mr. Deadie. Prince was of the architects' employee named Deadie, who apparently had direct charge of this work, said to Prince that he understood [illegible] why a strike had been called; that the jurisdictional [illegible] always structures required the doors to be installed by the "steel men," and the work had always been done in [illegible]

no question regarding the hanging of these doors in that manner had ever been raised before by the unions, and asked Brims to waive his objections in this instance, on the promise of the architects to change their specifications for future work of that kind, adding that the architects had always tried to "play fair" with the unions in the allotment of work. Bourke testified that Brims said that "he would have to admit they had been overlooking the cross-folding door matter, but had concluded quite recently they would make a point of it, and that was why the strike was called." McCumber joined in the conversation, asking to have the strike called off so that the building could be completed, and argued that the building was so near completion there would be little gained by the strike. Bourke, McCumber and Mundie all testified that Brims then said: "Is that all you have got us over here for?" to which Mundie replied: "If there is anything implied in that remark, I wish to say that in this office for over thirty years not a penny of tribute has ever been paid or ever would be;" whereupon Brims turned to Seefeldt and said: "Well, if that is all they have to say we had better go," and both left the office.

McCumber testified that during this interview both defendants were "very solemn about it, and said they didn't know any way on earth the men could be put back to work." When they went out, McCumber followed them into the hall and they went down the elevator together. He testified that on arriving at the street, he again asked them "what would have to be done to get the men back to work," and Brims said: "Mr. Seefeldt will call over to your office this afternoon and see you about it and I think you can get it settled;" and that the same afternoon, at three o'clock, Seefeldt called at McCumber's office and said: "We will have to be paid the amount of time the iron-workers put in on those doors," which he "figured" would be about $400; that

McCumber objected, saying, in substance, that the time put in by the iron-workers would not amount to more than $225; that Seefeldt agreed to this, and thereupon McCumber paid Seefeldt $225 in currency, and Seefeldt said he would notify the steward to put the men back to work the next morning; that as he was leaving, Seefeldt said: "Mac, I don't approve of this sort of thing at all; I don't like it, but I have to do it; I am made the goat by the higher-ups;" and asked McCumber to keep the matter between themselves. The carpenters and millwrights resumed work the next morning, July 24, 1920. Meantime, on July 24, 1920, the iron-workers suspended their work, because something in the machinery or hardware for one or two of the doors was missing, and they returned several weeks afterward and finished hanging those doors, apparently without objection on the part of the carpenters or the defendants.

There is evidence tending to prove that none of the $225 paid to Seefeldt was paid to any of the workmen who quit work as above stated. McCumber testified that none of his men lost any wages on account of the strike; that he used them on other buildings he was constructing, and that for the time they lost before this could be done, he paid them $30.50, which was charged to and repaid by the Henry Bosch Company. It was also shown that McDonald paid his men $175 for the time his millwrights lost during the strike, and that this amount was charged to and repaid by the Henry Bosch Company. One of the carpenters and one of the millwrights testified that they did not receive any money from anyone except their employers for the time they lost on account of the strike.

On behalf of the defendants, five witnesses testified to the prior good general reputation of the defendant Brime for honesty and integrity. The defendant Seefeldt did not testify in his own behalf. The defendant Brime testified that com-

Defendant objected, saying, in substance, that he thought that the iron-workers would not amount to more than $200; that conditions appeared to vary, and Chairman Johnson said he didn't want anybody, and Garfield would be willing to put the man back to work in such a way that it would be no harm. Garfield said: "Now, I don't approve of this sort of thing at all; I don't like it. But I have to be fair; I suppose the jury by the bigger-men," and added definitely to keep the matter between themselves. The stockholders and officials resumed work the next morning, July 24, 1888. Meanwhile, on July 23, 1888, the iron-workers suspended their work, because something in the machinery so damaged the one or two of the doors was taking, and they formal meeting work after-out and finished hanging these doors, apparently without objection on the part of the employers or the defendants.

There is evidence tending to prove that none of the $200 paid to Garfield was paid to any of the workmen who had work as above stated. Schwabe testified that none of his men had any wages on account of the strike; that he used them on other buildings he was constructing, and that for the time they lost before this could be done, he paid them $24.00, which was charged to and received by the Henry Heck Company. It was also shown that Kommerd paid his men $172 for the time his painters lost during the strike, and that this amount was charged to and repaid by the Henry Heck Company. One of the carpenters and one of the wallcovering testified that they did not receive any money from anyone except their employers for the time they lost on account of the strike.

In behalf of the defendants, five witnesses testified to the prior good general reputations of the defendant Shaw for honesty and integrity. The defendant Garfield did not testify in his own behalf. The defendant Shaw testified that com-

plaints had been made to him twice before July, 1930, concerning alleged violations by McCumber of the agreement with the carpenters' union and that he had called McCumber's attention to such alleged violations (consisting of having laborers instead of carpenters put up scaffolds and made forms for concrete), and that on each of such occasions McCumber had complied with his request to have his carpenters do such work, instead of laborers; that on July 30, 1930, after being told by Seefeldt that iron-workers, instead of carpenters, were hanging the cross-folding doors, he went to the building and saw McCumber; that McCumber told him that he had tried to stop the iron-workers but that they had refused to stop and that he (McCumber) was "up against it;" that Brims then said: "You know that is our work;" that McCumber replied: "I know it is: I have already taken it up with the Association and they told me it is carpenters' work; their business agent is over there," indicating Ryan, the business agent for the iron-workers; that he went over to Ryan and said to him: "Don't you know your men are doing our work?" to which Ryan replied: "I don't know anything of the kind;" that Brims then said: "Why not leave that alone and save my pulling a strike on this job;" to which Ryan replied: "I won't do anything of the kind. I don't give a damn whether you pull a strike or not;" that thereupon he told McCumber he would have to take the men off, and directed Seefeldt to do so. He also testified that he was present at the meeting in the architects' office, and that he told Mundie that McCumber had violated his agreement with the carpenters' union several times, and because of that he (Brims) had to take the carpenters off; that Mundie then asked: "What have we got to do to get these men back to work?" and that Brims replied: "Get the iron-workers off the doors and we will put our men back to work;" that Mundie then said: "Is there nothing else which may be done?" to which Brims replied: "I don't know of anything;

when I was coming over here, I thought probably you had some solution of the problem; apparently you have not;" that thereupon Wundie jumped up and intimated that "if we were looking for money we came to the wrong office;" that he (Brims) "got sore immediately and jumped up, saying, 'Gentlemen, if this is all you brought us over here for, we will go;'" that McCumber followed them down the elevator and asked what he could do to get the men back, to which Brims replied: "All I can say to you is that I am tired and disgusted; you have been violating this agreement right along; the minute you get the iron-workers off this job, Mr. Seefeldt will put your men back to work; this job is in his hands from now on;" and that this was the last thing he did in the matter. He denied all knowledge of the payment of money to Seefeldt, and denied that he ever received any money for anything he did in the matter.

It is contended by counsel for appellants that "no unlawful act, either as a means or an end, is shown in the record." The argument on this point is predicated upon the statement that "it is the law of this state that workmen have the absolute right to quit work (in the absence of a contract) for any reason or none;" and from this premise it is argued that no legal right of any person or corporation was infringed by defendants when they "called" the strike, or when they "called it off." Counsel say that the proof shows that McCumber hired union carpenters to work for him "under the terms of a certain agreement with the union," which "he repeatedly violated," and because of such violation the officials of the union (defendants) notified the union carpenters to quit work, which it is said, was done "in accordance with the rules of the union and the agreement with McCumber himself which these union carpenters have themselves adopted and authorized their officials to enforce." In making this argument counsel apparently overlooked the terms of the agree-

when I was coming over here, I thought probably you had some
relative of the problem; apparently you have not;" they there.
upon Bundle jumped up and intimated that "if we were looking for
money we came to the wrong office;" that he (Irwin) "got rave
Incredibly and jumped up, saying, 'Gentlemen, if this is all
you brought us over here for, we will go;'" that Wolcomber followed
them down the elevator and asked what he could do to get the man
back, to which Irwin replied: "If I may say so -- as that
an tired and disgusted; you have been violating this government
right alone; the minute you put the iron-workers off this job,
er, overlight will put your men back to work; this job is in his
hands from now on;" and then that was the last thing he did in
the matter. He denied all knowledge of the payment of money to
Overlight, and denied that he ever received any money for any-
thing he did in the matter.

It is contended by counsel for appellants that "no
material act, either on a means or an end, is shown to the record."
The argument on this point is predicated upon the statement that
"it is the law of this state that workmen have the absolute right
to quit work (in the absence of a contract) for any reason or
none;" and from this premise it is argued that no legal right of
any person or corporation was infringed by defendants when they
"called" the strike, or when they "called it off." Counsel say
that in great cases Overlight's action amounts to more
for him "under the terms of a certain agreement with the union,"
which "he repeatedly violated," and because of such violation the
officials of the union (defendants) ordered the union workmen
to quit work, which it is said, was done "in accordance with
the rules of the union and the agreement with Wolcomber because of
which these union workmen have discharged and
unauthorized their obligation to enforce." In making this
argument counsel apparently overlooked the issue of the agree-

ment hereinabove set out with reference to the settlement of disputes arising between the parties to such agreement, viz.: that no strikes should be called without the sanction of the joint conference board, that the officials of the union may interview the men at work but "shall in no way hinder the progress of the work," and that in case of dispute, there shall be "no cessation or abandonment of the work," but the dispute shall be submitted to the joint conference board. There is no evidence that the dispute in question was ever submitted to the joint conference board or that the defendants obtained the sanction of that board before calling the strike or calling it off. The evidence clearly points to the conclusion that they acted without such sanction and entirely on their own initiative, and that their purpose in so doing was to compel the owner of the building, or its contractors, to pay money to them, to get them to waive their claim that McCumber had violated his contract with the union in the matter of hanging the patented doors. Their action in thus calling a strike was a palpable breach of the agreement mentioned, which, if done for the purpose of obtaining money from the Bosch company by false pretenses, as charged in the second count of the indictment, or if done with the intention of injuring the business of the Henry Bosch Company, as charged in the third and fifth counts of the indictment, was unlawful. The statute on conspiracy provides that "if any two or more persons conspire or agree together * * * with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or employment, or property of another, or to obtain money or other property by false pretenses * * * they shall be deemed guilty of a conspiracy." In People v. Blumenberg, 271 Ill. 186, 194, after reciting this statute, it is said: "The statute expressly denounces conspiracies to injure the character, person, business, employment or property of another. Such an injury is an unlawful

act, and the section of the statute cited is expressly aimed against a conspiracy to do such act."

Much reliance is placed by counsel upon the decision in the case of Kemp v. Division No. 241, 255, Ill. 213, wherein it was held that if no contract rights are involved, a labor union which strikes for the purpose of compelling non-union men to join the union or be discharged from their employment, commits no actionable wrong; but there was no contract in that case forbidding such strikes until after a joint conference could be had, and from the opinions filed in that case, it appears that a majority of the court based their decision in part, at least, upon the fact that the averments of the bill showed that the primary purpose of the strike was to further the interests of the organization and better the condition of its members. As stated in the opinion of Mr. Justice Cooke (p. 224): "An agreement by a combination of individuals to strike or quit work for the purpose of advancing their own interests or the interests of the union of which they are members, and not having for its primary object the purpose of injuring others in their business or employment, is lawful." We think the facts in the present case, as hereinabove recited bring this case within the qualification above italicized, for they show beyond a reasonable doubt that the real purpose of the defendants in calling the strike in question was not the purpose of advancing the interests of the union of which the defendants were members, but that their real and primary purpose was to injure the business of the Henry Busch Company, by stopping work on its building, in direct violation of their own agreement, unless and until they were paid to permit the work to proceed; and as such purpose and such injury were unlawful, the actions of the defendants constituted an unlawful conspiracy as defined by statute.

[illegible] and the provisions of the statute which is expressly taken against a conspiracy in restraint of trade.

Such reliance is placed by counsel upon the decision in the case of Duke v. Littleton Co., supra, this, of course, because it was held that if an unlawful object was involved, a labor union violates the provisions of Sherman's Act by the exercise of boycotting measures which are taken on its behalf from their direct consequence, namely, an unlawful result; but there was no contract in that case directing such action which after a lapse, nevertheless would be and from the opinion filed in that case, it appears that a majority of the court based their decision in part, at least, upon the fact that the agreement of the mill manager that his primary purpose of the strike was to further the interests of the trades-unions and better the condition of its members, is shorter in the opinion of Mr. Justice Davis (p. 304)! "An agreement by a combination of individuals to strike or quit work for the purpose of enforcing their wishes as the majority of the union of which they are members, was not illegal for the primary purpose of injuring others, or that the business of the union is lawful." In Duke the facts in the present case, in particular where resulted during this case without the qualification above qualified, for they also happened a necessarily result; that the real purpose of the defendants in calling the strike in question was not the purpose of promoting the interests of the union of which the defendants were members, but that their real and primary purpose was to injure the business of the Henry Duke Company, by starting work on its building, in direct violation of their own agreement, unless and until they were paid to accede the work to a priority not as such purpose not such injury was unlawful, the actions of the defendants constituted an unlawful conspiracy as defined by statute.

It is next claimed that even if the proof shows a criminal conspiracy, there is a fatal variance between the proof and the indictment, in that while the indictment charges a conspiracy to injure the business of the Henry Bosch Company, the proof shows a conspiracy to injure the business of McCumber, the contractor. Each count of the indictment refers to the Henry Bosch Company as the corporation against whom the conspiracy was directed, but it does not follow from the mere fact that all the defendants' dealings were with McCumber, that the evidence does not prove an intent on the part of defendants to injure the business of the Bosch company. The rule is well recognized in this state that every sane man is presumed to intend all the natural and probable consequences of his deliberate acts; and because of this presumption, it is held that even in cases where a specific intent is alleged and necessary to be proved as laid, as in assault with intent to commit murder, a jury will be justified in inferring such intent from the proof of facts and circumstances showing that the injurious result was a natural and probable consequence of the unlawful act. Runaway v. People, 110 Ill. 336, is a case of that character. Runaway was convicted of assault with intent to murder one Hendrickson. The proof was to the effect that Runaway, without provocation, shot at one Hartwell, but the bullet hit Hendrickson instead, inflicting a serious wound. It was there contended that because the indictment charged an assault with intent to kill Hendrickson and the proof showed an apparent intent to kill Hartwell, the conviction could not stand; but the court said that Runaway shot in the direction of Hendrickson, "and the law is, a party intends the necessary consequences of an act deliberately done," and held that the intent to kill Hendrickson was properly inferred from the facts stated, and sustained the conviction. That case was recently examined and approved in The People v. Cohen, 288 Ill.

It is most claimed that even if the proof shows a criminal conspiracy, there is a fatal variance between the proof and the indictment, in that while the indictment charges a conspiracy to injure the business of the Henry Doak Company, the proof shows a conspiracy to injure the business of McNamara, the manufacturer. Such cases of the indictment refers to the Henry Doak Company as the corporation against whom the conspiracy was directed, but it does not follow from the mere fact that all the defendants' dealings were with McNamara, that the evidence does not prove an intent on the part of defendants to injure the business of the Doak company. The rule is well recognized in this state that every man is presumed to intend all the natural and probable consequences of his deliberate acts; and because of this presumption, it is held that even in cases where a specific intent is alleged and necessary to be proved as laid, as in assault with intent to commit murder, a jury will be justified in inferring such intent from the proof of facts and circumstances showing that the injurious result was a natural and probable consequence of the unlawful act. Hannon v. People, 110 Ill. 236, is a case of that character. Hannon was convicted of assault with intent to murder one Hendrickson. The proof was to the effect that Hannon, without provocation, shot at Hendrickson, but the bullet hit Hendrickson instead, inflicting a serious wound. It was there contended that because the indictment charged an assault with intent to kill Hendrickson and the proof showed an attempt intent to kill McNamara, the variance could not stand; but the court held that Hannon shot in the direction of Hendrickson, "and the law is, a party intends the necessary consequences of an act deliberately done," and held that the intent to kill Hendrickson was properly inferred from the facts stated, and sustained the conviction. This case was recently examined and approved in The People v. Cahan, 245 Ill.

506, 511. To the same effect are Menyer v. The People, 132 Ill. 536, 540; Crosby v. The People, 137 Ill. 325, 336; People v. Muskauskas, 268 Ill. 338, 351; and People v. Crenshaw, 298 Ill. 412, 417.

Louis Busch, the steward of the carpenters, a union man, testified that in June, 1920, before anything was done towards hanging the doors, Seefeldt said to him: "There are so many jackknife doors to come; when they come, let me know; we want to hang them;" that when the doors came, the witness telephoned that fact to Seefeldt; that a day or two after, Seefeldt said to the witness: "There will be some fittings here, and you want to be sure and put those fittings on; I had an understanding with McCumber, we will go fifty-fifty on this job;" that the carpenters put on the hinges and hardware and rollers for the guides, and the witness then told Seefeldt: "We have done our half;" to which the latter replied: "We have to hang them, too; when the fixtures get here call me up," which the witness did, - twice - but Seefeldt did not respond until he came with Grims and called the strike. This evidence was not contradicted, and in connection with other evidence already stated, tends to prove that Seefeldt (and probably Grims as well) had seen the plans and specifications, or were well informed regarding the provisions of the same. We think it is clear, also, that the evidence tends to prove that they knew the building was being constructed for the Busch Company, by its contractors, under the supervision of Mundie and Jensen, its architects.

When, therefore, the defendants called the strike, they knew that their action would not only injure the contractors, McCumber and McDonald, and impede the progress of their work, but also that the natural, probable, and, in fact, necessary consequence of their action would be to hinder and obstruct the work

[illegible]

[illegible]

[illegible]

on the building and thereby injure the business in which the Bosch company was then engaged, viz., the construction of its factory building. It follows, upon the principle announced in the cases cited above, that the jury were justified in finding them guilty of conspiracy with unlawful intent to injure the business of the Henry Bosch Company, as charged in the indictment.

Complaint is also made of some of the rulings of the trial court relating to the admission of evidence, and of the giving of certain of the instructions. What we have said disposes, in effect, of the alleged errors regarding the admission of evidence. As to the instructions, we have carefully examined the same, in the light of the objections stated by counsel, and are of the opinion that no prejudicial error was committed.

The judgment of the Criminal Court is affirmed.

AFFIRMED.

Gridley, P. J., and Barnes, J., concur.

on the ground that thereby judge the decision is where the Board Chairman, the same company, with, the manufacturing of its factory building. In fairness, since the principle enunciated in the cases cited above, that the jury must justified in finding some guilty of conspiracy with minority intent to injure the business of the Sheep Dance Company, is accepted in the instant case.

Conspiracy is also made in area of the college of the trial court relating to the relevance of evidence, and to the effect of verdict of the jurisdiction. This is here will also phase, in civil, of the alleged errors regarding the admission of evidence. As to the instructions, we have carefully examined the same, in the light of the evidence taken by counsel, and are of the opinion that no prejudicial error was committed.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

Pratt, J., and Burton, J., concur.

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THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant in Error,

vs.

ALBERT J. MOORE and
GABRIEL S. ADAMS,
Plaintiffs in Error.

ERROR TO

CRIMINAL COURT,

COOK COUNTY.

MR. JUSTICE FITCH DELIVERED THE OPINION OF THE COURT.

The defendants, Moore and Adams, were tried in the Criminal Court upon an indictment consisting of two counts, the first charging a conspiracy to obtain money by means of a confidence game, and the second, a conspiracy to obtain money by false pretenses. The defendants pleaded not guilty. There was a jury trial and verdicts finding each defendant "guilty of conspiracy in manner and form as charged in the indictment." Upon these verdicts defendants were sentenced to jail and fined. They prosecute this writ of error.

In this court defendants' counsel contends that the verdicts are contrary to the evidence and that the trial court erred in admitting incompetent evidence, and in modifying one of defendants' instructions. The state's attorney disputes these contentions and insists that both defendants were clearly shown to be guilty under both counts.

After careful study of the evidence in the record in the light of these respective claims of counsel and the authorities submitted by them, we are constrained to hold that the competent evidence adduced in support of the indictment is so hopelessly entangled with incompetent and irrelevant testimony prejudicial to defendants that the convictions obtained on such evidence cannot be allowed to stand. As the case must be

THE PEOPLE OF THE STATE
OF ILLINOIS,
Defendant-Appellee,

vs.

ALBERT L. SMITH, and
CHARLES E. JONES,
Plaintiffs-in-Error.

Error to
Criminal Court
of Cook County.

No. 22223 HON. WILLIAM H. SCHOLTZ, JUDGE PRESIDING.

Mr. Justice Stone delivered the opinion of the court:

Mr. defendants, Smith and Jones, were tried in the criminal court upon an indictment charging of the murder, the first charging a conspiracy to obtain money by means of a mortgage bond, and the second, a conspiracy to obtain money by false pretenses. The indictments charged each crime. There was a jury trial and evidence tending to show defendants guilty of conspiracy in manner and form as charged in the indictment. Upon these verdicts defendants were sentenced to jail and fined. They prosecute this writ of error.

In this court defendants' counsel contend that the verdicts are contrary to the evidence and that the trial court erred in admitting incompetent evidence, and in excluding competent evidence. The plaintiff attorney filed a motion and brief that both contentions were clearly shown to be guilty under both counts.

A brief summary of the evidence is the record

In the light of these contentions alleged of counsel and the authorities submitted by them, we are convinced in view that the competent evidence adduced in support of the indictments is so inextricably entangled with incompetent and irrelevant testimony probably to determine that the convictions obtained on such evidence cannot be allowed to stand. In the case must be

tried again, we shall refrain from stating the evidence further than is necessary to show our reasons for this conclusion.

At the time of the trial the defendant Moore was forty-two years of age, married and living with his wife in a dwelling house on East Ontario street, Chicago. The defendant Adams, aged thirty-two, was also married and living with his family at the same place. The defendants conducted there a school called "The Life Institute," an unincorporated association, of which Moore was president, and Adams his chief assistant. A pamphlet introduced in evidence, evidently written by Moore, purports to show the objects and purposes of this school. This pamphlet states that "The Life Institute is organized for the purpose of healing and teaching any one in need, and removing any obstacle encumbering his path. It does this by taking each applicant for enrollment as a separate unit, looking into and diagnosing his case according to the best known methods of Psychoanalysis, but especially from a spiritual basis. * * * By correct diagnosis and direct help it enables him to overcome any handicap he may have so he can express confidence, mental capacity, freedom, spiritual power. * *.* If you have a physical disease - or a bad temper - if conditions are not right at home - or there is trouble in your work or business - if you desire to become a real artist or musician or any other worth-while thing but cannot quite accomplish the desired thing, come to The Institute. Every kind of difficulty can be overcome at The Institute through the operation of spiritual laws."

The pamphlet from which these quotations are taken consists of thirty-one printed pages, containing a confused jumble of quotations from famous writers and poets, interspersed with quotations from Moore's own writings, references to alleged scientific facts and principles, tables of vibrations in music, the

brief again, we shall refrain from whetting the religious curiosity in order our reasons for this conclusion.

At the time of the trial the defendant Sorre was forty-two years of age, married and living with his wife in a dwelling house on Jack Rabbit street, Chicago. The defendant's house, kept spotless, was also matched and living with his family at the same place. The defendants occupied there a school called "The Life Institute," an unincorporated association, of which Sorre was president, and where his chief assistant, a psychic researcher in religions, evidently written by Sorre, prepared to show the objects and purposes of this school. This pamphlet states that "The Life Institute is organized for the purpose of healing and teaching any one in need, and therefore can effectively accomplishing his work. It does this by taking such applicant for establishment as a separate unit, lighting into and illuminating his new personality to the best known methods of Psychosynthesis, but especially from a spiritual basis. * * * By marvels diagnosis and direct help it enables him to overcome any hindrance he may have as to his express realization, mental energy, fraternal, spiritual power, * *. If you have a physical disease - or a bad temper - if conditions are not right at home - or there is trouble in your work or business - if you desire to become a real artist or musician or any other worthwhile talent and cannot yet accomplish the desired aims, come to the Institute. Every kind of difficulty can be overcome at the Institute through the principles of spiritual law."

The pamphlet from which these quotations are taken consists of twenty-one printed pages, containing a confused jumble of quotations from famous writers and poets, interspersed with quotations from Sorre's own writings, references to alleged scientific facts and theories, notes of testimonies in praise, the

alleged effect of such vibrations upon persons and things, flippant references to the Bible and the Deity, and a bombastic life-history of Moore. It states that Moore had for several years been a Christian Science practitioner, but had left the "Mother Church" because he decided "there was something to be learned that was not yet known;" whereupon he set out to find "this elusive something," and "having found what he sought, he is now devoting his time to teaching it to others, so that they in turn may pass it along with its message of 'Peace and good will to all men.' * * * His studies include the seven major Vibrations, - in simple language, solid matter (so-called), Water, Air, Electricity, Electro-magnetism, Psycho-magnetism, Metaphysics. * * * Albert J. Moore, Master Metaphysician * * * diagnoses and counsels on all kinds of disease and difficulties. Consultation, Healing, and Teaching are given at reasonable rates."

It appears from the evidence that Moore was in the habit of delivering lectures upon his theories, and that one of such lectures was delivered in Oregon, Illinois. The prosecuting witness, who resides there, attended the lecture, met Moore, and was invited by him to attend his other lectures in Chicago. She testified that in his lectures he claimed to be able to heal the sick in body and in mind and to raise the dead. She testified she did not believe he could raise the dead but "thought possibly" he could teach her "the art of healing," and that she paid him $25 "to take a chance" on the probability that he would accomplish that result. The proof as to just what he said in his lectures is not at all clear, but it appears that after hearing several of these lectures, some of which were given by Moore and others by Adams, the prosecuting witness became so impressed with what they said - whatever it was - that she became one of six persons - four women and two men - who contributed $1000 each to forward

the purposes of the "Life Institute," and they become trustees of the Institute; also that she thereafter from time to time loaned or advanced to Moore for the same purpose, sundry additional sums of money aggregating $1800. There is some evidence tending to prove that the money thus raised was expended for printing pamphlets and circulars, and in defraying the living expenses of those who lived at the home of the Life Institute on Ontario street. The prosecuting witness remained a trustee for about five months, and then resigned.

For the ostensible purpose of showing guilty intent the state's attorney asked, and the court permitted, several of the witnesses to relate a number of things they heard, and some things they saw, tending to show improper conduct on the part of Moore with two of the women trustees at the house on Ontario street, and of Adams with another. Some of this testimony was objected to, and some of it was admitted without objection. At one point in her testimony on this subject, the prosecuting witness protested by saying: "This is terrible. Is there no way I can get out of this?" To which the court replied: "I think not." A moment later, after overruling an objection of defendants to going further into this sort of inquiry, the court said to the witness: "Anything that is said for indecent purposes the time and place must be given, and, of course, while it is not pleasant, it is necessary." The next question of the state's attorney was: "What was your reason for leaving the Life Institute?" Over the objection of defendants' counsel she was permitted to answer, and she replied: "I didn't think it was run right. I told them if they were going to run a harem I was not going to be a party to it." There is much of this kind of testimony in the record.

In our opinion, none of this evidence tended to prove any element of the crime charged in the indictment. The competent evidence in the record tends to prove that the money paid by the

the purposes of the "Life Institute," and they brought witnesses of the Institute; also that she thereafter from time to time loaned or advanced to Moore for the same purpose, sundry additional sums of money aggregating [illegible]. There is some evidence tending to prove that the money thus raised was expended for printing pamphlets and circulars, and in defraying the living expenses of those who lived at the home of the Life Institute on Dakota street. The prosecuting witnesses remained a trustee for about five months, and then resigned.

For the ostensible purpose of showing quality in behalf the state's attorney asked, and the court permitted, errors of the witnesses to relate a number of things they heard, and some things they saw, tending to show propaganda conducted on the part of those with ire of the women involved, at the Home on Dakota street, and of dealing with another. Some of this testimony was objected to, and some of it was admitted without objection. At one point in her testimony on this subject, the prosecuting witness prompted by saying: "This is terrible. Is there no way I can get out of this?" To which the court replied: "I think not." A moment later, after overruling an objection of defendants to going further into this mess of insanity, the court said to the witness: "Anything that is paid for immoral purposes the time and place must be given, and, of course, while it is not pleasant, it is necessary." The most question of the state's attorney was "What was your reason for leaving the Life Institute?" Over the objection of defendants' counsel she was permitted to answer, and she replied: "I didn't think it was run right. I told them if they were going to run a house I was not going to be a party to it." There is much of this kind of testimony in the record.

In our opinion, none of this evidence tended to prove any element of the crime charged in the indictment. The competent evidence in the record tends to prove that the money paid by the

prosecuting witness to Moore was paid by her for instruction in Moore's theory of the art of healing and to promote the objects and purposes of the so-called "Life Institute," as set forth in the pamphlet above mentioned and in similar pamphlets and circulars offered in evidence. If Moore and Adams gave, as they promised to give, such instruction, and if the money so paid was in fact used for the purposes stated - and there is evidence tending to support that theory of the facts - then there could be no valid conviction under either count of the indictment, even if it were true that defendants were guilty of some other offense. In the trial of a criminal case, the evidence must be confined to the issues involved. Evidence tending only to show that the accused is an immoral man, or evidence of other dissimilar transactions involving suspicion of wrong-doing, or of dissimilar acts from which inferences of general moral turpitude may be drawn, and which have no bearing on the material issues in the case, should not be admitted. (People v. Clemenson, 180 Ill. 135, 142; People v. Pfanschmidt, 182 Ill. 411, 414; Addison v. People, 193 Ill. 405, 414.)

The effect of the admission of this incompetent and irrelevant testimony upon the minds of the jury may well have been to create the impression that if the defendants were guilty of such immoral conduct, they must be guilty of the crime charged. Whether the jury took that view or not, it was error, prejudicial to the defendants, to admit such evidence in this case. The case is not one in which it can be said that the guilt of the defendants as charged was so clearly shown by the evidence that the error in admitting the incompetent testimony was harmless.

We may also add that the practice that was followed in this case, of having witnesses called by the court and briefly examined, and then permitting counsel for both sides to cross examine them at length, was criticised in People v. Clemenson.

proceeding whence to Moore was paid by but for instruction in Solon's theory of the art of healing and to ensure the objects and purposes of the so-called "life institute," as set forth in the pamphlet above mentioned and in similar pamphlets and circulars offered in evidence. If Moore and others were, as they pretend to live, with institutions, and if the study is still as it was for the purposes stated - and there is evidence tending to support this theory of the facts - then there would be no valid territorial court-room evidence exist of the contrary, even if it were true that defendants were guilty of some other offense. In the trial of a criminal case, the evidence must be confined to the issues involved. Evidence tending only to show that the accused is an immoral man, or evidence of other dissimilar transactions including examples of "sexy-talk," or of disciplinary acts from which inferences of general moral turpitude may be drawn, and which have no bearing on the material issues in the case, should not be admitted. (People v. Chamberlain, 191 Ill. 134, 139; People v. Kennedy, 159 Ill. 148, 161; Spies v. People, 122 Ill. 406, 414.)

The effect of the admission of this incompetent and irrelevant evidence upon the minds of the jury may well have been to create the impression that if the defendants were guilty of some immoral conduct, they must be guilty of the other charges, whether the jury took that view or not, it was error, prejudicial to the defendants, to admit such evidence in this case. The mere is not one in which it can be said that the guilt of the defendants is charged was so clearly shown by the evidence that the error in admitting the incompetent testimony was harmless.

It may also be said that the practice that was followed in this case, of having witnesses called by the state's attorney examined, and then permitting counsel for both sides to cross examine them at length, was established in People v. Chamberlain,

supra, where it was held that such practice should not be extended beyond the limits of the rule announced in Carle v. People, 200 Ill. 494, and that "when the circumstances justify a court in calling a witness, the cross-examination should be limited to the issues involved and kept within proper bounds." In this case, the cross-examination by the state's attorney of two witnesses called by the court was not thus limited, but was extended to many wholly immaterial matters, including the alleged immoral conduct already mentioned, and the fact that money paid to Moore by one of such witnesses was paid without her husband's knowledge.

We think there was no error in modifying the defendants' tenth instruction, for the reason that whether the money paid took the form of a gift, or a donation, or a loan, is immaterial if, in fact, the circumstances were such as to show beyond a reasonable doubt that the prosecuting witness was induced by the defendants to part with her money by false representations of existing facts or past events, or by wrongfully taking advantage of the confidence reposed in them by such witness.

For the reasons stated, the judgment of the Criminal Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Gridley, P. J., and Barnes, J., concur.

Ibid., where it was held that such prudent or thrifty act to avoid beyond the limits of the rule announced in *Davis v. Pierce*, 700 P.2d, 404, and that "when the circumstances justify a court in ordering a witness, the cross-examination should be limited to the issues involved and kept within proper bounds."

In this case, the cross-examination by the plaintiff's attorney of the witnesses called by the court was not kept limited, but was extended to many wholly immaterial matters, including the alleged immoral conduct already mentioned, and the fact that money paid to them by one of such witnesses was paid without her husband's knowledge.

It seems that you do claim it justifying the defendant's conduct, for the reason that whether the money paid took the form of a gift, or a donation, or a loan, it immaterial if, in fact, the circumstances were such as to show beyond a reasonable doubt that the plaintiff witness was induced by the defendants to part with her money by false representations of existing facts or past events, or by unfairly taking advantage of the conditions required in them by such witness.

For the reasons stated, the judgment of the lower court be reversed and the cause remanded.

EXCEPTIONS AND REMANDED.

Gaffney, P.J., and Jerman, J., concur.

Opinion filed July 3, 1923.

23677

WILLIAM RANDELL and DAVID BARINHOLZ, copartners, doing business as United Auto Wreckers, Appellees,	
v.	INTERLOCUTORY APPEAL FROM CIRCUIT COURT, COOK COUNTY.
COMMUNITY STATE BANK, a corp., Appellant.	

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

The complainants, William Randell and David Barinholz, copartners, doing business as the United Auto Wreckers, having from time to time borrowed money from the defendants, The Community State Bank, and given promissory notes and other securities therefor, filed a bill of complaint, praying for an accounting and that the defendant be enjoined from disposing in any way of two certain promissory notes. A temporary injunction was issued, and a motion to dissolve, after argument of counsel, was denied. This appeal is therefrom.

The sole question that arises is whether the chancellor, on the face of the bill was justified in overruling a motion to dissolve the injunction.

The bill of complaint is elaborate, containing about twenty-five type written pages, and purports to set forth the history of a series of pecuniary transactions that took place between the parties from December 19, 1919, to October 1, 1921. It shows substantially the following:-

In December, 1919, the complainant, who had a checking account with the defendant (hereinafter called the bank) applied to the latter for a loan of $5,000.00 for one year. The bank agreed to make the loan if the complainant would agree to pay $1500.00 for the loan as a commission. On December 10, 1920, that was agreed to, and the complainants, at the office of the attorneys of the bank, executed a note for $6500.00 and a chattel mortgage to secure it. The bank then placed to the credit of the complainants the sum of $5,000.00. From December 10, 1919, to December 10, 1920, the complainants paid the bank interest, from 7 per centum annually to 1 per cent a month, on $6500.00, as it was demanded.

On December 16, 1920, the complainants paid the bank $2500.00 leaving due on the principal $2500.00 and $1500.00 due for commission; and, on January 15, 1921, paid a further sum of $1000.00 on account of the remaining principal, leaving due $1500.00 of the original principal and the commission of $1500.00. On March 10, 1921, the complainants having discounted with the bank certain negotiable securities and paper which they had received in their business of selling automobiles, etc. and owing the bank at that time $1200.00 for such discounts, the bank demanded payment of the $1200.00 and the $1500.00 balance of the original principal of $5000.00, and, of the $1500.00, the original commission. Being unable to pay the amount demanded, the bank proposed that certain new notes should be executed which should include the just mentioned amounts and another commission fixed at $500.00. Accordingly four notes, each for $1175.00, were executed. They included the balance of the original loan, $1500.00; the commission of $1500.00; the amount due on discounted paper, $1200.00; and an extra commission of $500.00. The four $1175.00

In December, 1919, the complainant, who had a transacting relationship with the defendant (Dorchester Savings Bank) applied to the latter for a loan of $5,000.00 for one year. The bank agreed to make the loan if the complainant would agree to pay $1000.00 for the loan as a commission. On December 16, 1919, this was agreed to, and the complainants, at the office of the defendant bank, executed a note for $4000.00 and a chattel mortgage to secure it. The bank then issued to the grantee of the complainants the sum of $5,000.00. Prior December 16, 1919, or December 12, 1920, the complainants paid the bank interest, from 7 per cent annually to 8 per cent a month, as fixed by the bank.

On December 16, 1920, the complainants paid the bank $1000.00 leaving due on the principal $3000.00 and $300.00 for commission; on January 30, 1921, paid a further sum of $1000.00 on account of the remaining principal, leaving due $2000.00 of the original principal and the commission of $300.00. On March 21, 1921, the complainants being discussed with the bank certain mortgaging securities are upon which they had entered in their business of selling automobiles, and being the bank at that time $1400.00 for work performed, the bank demanded payment of the $1400.00 and the $300.00 balance of the original principal of $2000.00, and, of the $300.00, the original commission. Being unable to pay the amount demanded, the complainants proposed that certain new notes should be executed which should include the past mentioned commission and monthly payments thereon at $200.00, including the balance, then for $1872.00, with interest. They included the balance of the original loan, $300.00; the commission of $300.00; the amount due on discounted paper, $1000.00; and an notes outstanding of $200.00. The first $1872.00

notes were due respectively as follows: April 23, 1921, May 24, 1921, June 23, 1921, and July 23, 1921, and each drew interest.

On May 3, 1921, the complainants paid the first note of $1175.00 together with interest; and paid the second $1175.00 note by $550.00 on June 13, 1921, and $625.00 on June 27, 1921, together with interest in the sum of $6.25. As the complainants informed the bank that they were unable to pay the two notes of June 23 and July 23, 1921, the bank agreed to extend them for one and two months respectively, provided the complainants would pay the further sum of $150.00 commissions. The complainants agreed to do so; and, on August 2, 1921, executed two new $1175.00 notes, due, respectively September 1 and October 1, 1921. Both notes provided for interest.

On September 10, 1921, the complainants not having been able to pay the note due on September 1, 1921, paid the bank $175.00 together with $15.00, charged by the bank because the note was not paid when due. On September 22, 1921, the bank demanded the balance of $1000.00 due on September 1, 1921, but the complainants being unable to pay it, it was agreed that a new note for $1,000.00 should be given, and the note for $1175.00 delivered to the complainants.

The complainants, on September 22, 1921, executed a new note for $1,000.00, and agreed to pay $25.00 as commission, but the bank did not return the $1175.00 which was due on September 1, 1921.

The bank has in its possession the note for $1175.00 dated August 2, 1921, and due October 1, 1921, and the note for $1,000.00 dated September 22, 1921, and due fifteen days thereafter.

notes were due respectively on January; April 20, 1922, May 24, 1921, June 27, 1921, and July 22, 1922, not much more interest.

On May 3, 1922, the complainants paid the first note of $1172.00, together with interest; subject the second $1172.00 note by $800.00 on June 13, 1922, and $200.00 on June 27, 1922, together with interest in the sum of $2.32. In the complaints filed the most that they were unable to pay the two notes of June 27 and July 22, 1921, the last mentioned is stated been for $1172.00 respectively, attached the complainants said the further sum of $200.00 complaints. The complainants signed 20 do so; and, on August 2, 1921, assigned the new $1172.00 notes, the respective payees 1 and October 1, 1921. Both notes providing for interest.

On September 17, 1921, the complainants not having paid to pay the note due on September 1, 1921, with the sum $172.00 together with $32.00, assigned by the bank because the notes not paid when due. September 24, 1921, the bank assigned the balance of $1200.00 due on September 1, 1921, but the complainants being unable to pay it, it was agreed that a new note for $1,000.00 should be given, and the note for $172.00 delivered to the complainants.

The complaints, on September 20, 1921, received a new note for $1,000.00, and agreed to pay $20.00 on commission, and the bank did not return the $172.00 which was due on September 1, 1921.

The bank has in its possession the note for $172.00 dated August 2, 1921, and due October 1, 1921, and the note for $1,000.00 dated September 21, 1921, and due fifteen days thereafter.

On October 5, 1921, the bank demanded payment of both last mentioned notes, and the complainants then demanded credit for commissions and usurious interest. It was on that date that the complainants first learned that the chattel mortgage securing the $5,000.00 note of December 10, 1918, ran to one Rothbaum, as mortgagee, although he had no interest in it, and that it was so drawn to cover up and conceal the usury at the request of the bank. As a result of all the transactions, and as against the note of $1175.00, dated August 2, 1921, and due October 1, 1921, and the note for $1,000.00, dated September 22, 1921, and due fifteen days later, there is due as credit in favor of the complainants, for usury and unjust commissions, the following amounts; $1500.00 commission charged on $5,000.00 loan, $500.00 commission charged for extending payment of $1500.00 and renewing $1500.00 balance of $5000.00; $150.00 commission for extending payment of two notes, each for $1175.00 due June 23 and July 23, 1921, respectively, also $25.00 commission for extending balance of $1000.00 due on note for $1175.00 note due 15 days after September 22, 1921, and $15.00 for usurious interest charged on September 10, 1921.

The bank holds the notes, although all have been paid, excepting the last two, on which the complainants claim credit; The bank, although requested has refused to deliver the notes to which the complainants are entitled.

The complainants requested the bank to account but it refused, and they claim that the bank has received over $3,000.00 in usury in the transactions mentioned.

The bank has threatened to sell or assign or otherwise dispose of the said notes, particularly the $1176.00 note dated August 2, 1921, and due October 1, 1921, and the note of $1,000.00

On October 8, 1982, the bank issued payment of both land purchase notes, and the complainants then requested credit for commissions and accrued interest. It was on that date that the complainants first learned that the original mortgage covering the $8,000.00 note of December 10, 1982, was in default, no mortgagee, although he had no interest in it, and that it was necessary to pay up and cancel the mortgage in the records of the bank. As a result of all the transactions, and an original the note of $1878.00, dated August 2, 1982, and due October 1, 1983, and the note for $1,000.00, dated September 28, 1982, and due fifteen days later, there is due on credit in favor of the complainants, for nearly one hundred commissions, the following amounts: $1000.00 commission charges on $8,000.00 loans, $500.00 commission charges for extending payment of $1000.00 and remaining $1000.00 balance of $2000.00; $250.00 commission for extending payment of two notes, each for $1178.00 due June 28 and July 28, 1983, respectively, also $20.00 commission for extending balance of $1000.00 due on note for $1878.00 until the 18 days after September 28, 1983, and $10.00 for nonpaying interest accrued on September 10, 1983.

The bank pulls the notes, although all have been paid, excepting the last two, on which the complainants claim actually the bank, although requested has refused to deliver the notes to which the complainants are entitled.

The complainants requested the bank to account but it refused, and they claim that the bank has received over $2,000.00 in excess in the transactions mentioned.

The bank has discontinued to sell or receive or otherwise dispose of the said notes, particularly the $1878.00 note dated August 2, 1982, and the October 2, 1983, and the note of $2,000.00

dated September 22, 1921, due 15 days after date, which note was given "to prevent your orators from interposing the defense of usury in accordance with the Statute", etc. The bank on December 9, 1921, confessed judgment on the two last mentioned notes in the Circuit Court against the United Auto Wreckers, Incorporated, but after pleas had been filed, the cause was dismissed for want of prosecution, the bank failing to appear. The bank now threatens to institute suit upon the notes and charge that they were executed by the corporation whereas they were executed by the copartnership.

The prayer is for an accounting and that the bank be decreed to pay the complainants what may be found to be due them,- and the complainants offer to pay what they may be found to owe the bank - and that the bank be restrained from in any way disposing of the notes of the complainants, particularly the $1175.00 note of August 2, 1921, and the $1,000.00 note of September 22, 1921, and be restrained from instituting action at law upon the notes of the complainants.

The chancellor issued an injunction restraining any disposition of the two notes, and enjoining the bank from proceeding with any action at law upon them, until a further order of the court. It provided for a bond by the complainants in the sum of $2500.00.

It is contended by counsel for the defendant that in such a case a court of chancery has no jurisdiction because there is an adequate remedy at law. We do not agree with that contention. The complainants set up a series of transactions involving a number of loans, payments, charges of commission and usury, that altogether make a particularly apt case for a court of equity as against a court of law. Then, too, the claim is for an

accounting, and ample facts are pleaded to give a court of equity jurisdiction. The chancellor examined the matter, and in his discretion issued the injunction. We think he was fully justified. If, upon a trial, the evidence shows the usury equals the unpaid principal, the two notes will be cancelled, so, it is but just, upon the complainants giving ample bond, to enjoin the bank both as to the disposition of the notes and suit upon them.

The decree will be affirmed.

AFFIRMED.

O'CONNOR AND THOMSON, JJ. CONCUR.

24 - 27848

Opinion filed July 3, 1923.

(5281)

SAMUEL GROSSMAN,

Appellant,

v.

WILLIAM HALE THOMPSON, JOHN DILL ROBERTSON, ROBERT J. McLAUGHLIN, THOMAS E. WILSON, D. F. KELLY, GEORGE F. HARDING, JR., PAGEANT OF PROGRESS, a corp., HEALTH AND SANITATION EXPOSITION, a corp., EDGAR A. JONAS, HENRY J. KRAMER, CHARLES R. FRANCIS, CITY OF CHICAGO, a Municipal Corporation and CHICAGO BOOSTERS' PUBLICITY CLUB, a Corporation,

Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE THOMSON delivered the opinion of the court.

The complainant, Grossman, filed this bill in equity against the defendants seeking to have the court declare null and void certain leases entered into between the City of Chicago, of which certain of the defendants were officials, and corporations with which those same defendants were connected in an official capacity; and also seeking an accounting of profits alleged to have been derived by the defendants through the holding of an exposition known as the Pageant of Progress, which exposition was held on the Municipal Pier of Chicago, by virtue of the aforesaid leases.

Upon the filing of the original bill, the defendants filed their joint and several answers thereto. The complainant immediately made a motion for the appointment of a receiver, which motion was heard by the court on the bill and

answers, and after such hearing the court ruled that a receiver should be appointed. Thereupon the defendants offered to give bond in lieu of the appointment of a receiver, pursuant to the statute, which offer the court accepted and it was thereupon ordered that the defendants give bond in the sum of $350,000.00 in lieu of the appointment of a receiver, and a bond in that amount was duly filed by the defendants accordingly.

Thereafter certain of the defendants appeared before one of the other judges of the trial court to whom the case had been assigned and asked leave to withdraw the answers previously filed by them and file demurrers, and this they were permitted to do. Pursuant to such leave these defendants filed a general and special demurrer to the original bill. Upon a hearing of these demurrers, the court overruled the general demurrer and sustained the special demurrer, which was directed to that part of the bill seeking the recovery of profits and an accounting, and the court further vacated the various orders which had theretofore been entered, requiring the filing of a bond in the sum of $350,000.00 in lieu of the appointment of a receiver, and in this connection the trial judge entered an order directing that the bond which the defendants had filed be surrendered and canceled and the bondsmen discharged, and that such funds as had been tied up by the previous orders be released.

The complainant then procured leave of court to file an amended bill, pursuant to which such amended bill was duly filed and thereafter the complainant moved for the appointment of a receiver based upon his said amended bill which was duly verified, and this motion was denied. The defendants then

Moreover, all other acts bearing the same point that a re-
serve should be reopened. Inasmuch the commission attempt
to give bond in lieu of the requirements of a receiver, pur-
suant to the statute, which after the court adopted and it
was therefore argued that the defendants give bond in the
sum of $20,000 in lieu of the requirements of a receiver,
and a bond in that amount was duly filed by the defendants
accordingly.

Thereafter motion of the defendants requested before
one of the white judges of the trial court to show the rea-
son why the plaintiff had failed to minister the income pro-
perly filed by them and file inventory, and why they were
prohibited to do. Thereupon it was found that defendants
filed a general and special demurrer to the original bill.
Upon a hearing of these demurrers, the court overruled the
general demurrer and sustained the special demurrer, which was
directed to the part of the bill seeking the recovery of
profits and to accounting, and the court further ordered the
region order which had theretofore been entered, requiring
the filing of a bond in the sum of $20,000 in lieu of the
appointment of a receiver, and in this connection the court
further entered an order directing that the bond which the defen-
dants had filed be surrendered and accepted and the sureties
discharged, and that each party be and hereby is ordered to
pay their own costs in relation.

The complainants then presented leave of court to file
an amended bill, pursuant to which such amended bill was duly
filed and thereafter the complainants moved for the appointment
of a receiver based upon the bill amended bill which was duly
verified, and such motion was denied. The defendants then

filed a general and special demurrer to the amended bill and upon a hearing, the court sustained the general and special demurrers. The complainant then elected to stand by his amended bill, whereupon the court entered a decree dismissing the bill for want of equity. To reverse that decree the complainant has perfected this appeal.

The amended bill alleges that the complainant is a taxpayer of the City of Chicago, and brings this suit as such taxpayer for and in behalf of all other taxpayers, and such of them as may desire to become parties to this suit; that the City is a duly organized municipal corporation, and that William Hale Thompson is Mayor, John Dill Robertson, Health Commissioner, George F. Harding, Jr., Comptroller, Charles R. Francis, Commissioner of Public Works, Edgar A. Jonas, Assistant Corporation Counsel of the City of Chicago; that Edgar A. Jonas in addition to being assistant corporation counsel, is attorney for the Municipal Tuberculosis Sanitarium; that Henry J. Kramer, is an associate of said William Hale Thompson, Mayor, and as such, in connection with said Thompson, as Mayor, assisted him in conducting various municipal projects.

The bill further alleges that said William Hale Thompson, John Dill Robertson, Charles R. Francis, George F. Harding, Jr., Edgar A. Jonas and Henry J. Kramer, were either officers or directors of the defendant, Pageant of Progress, a corporation; Health and Sanitation Exposition, a corporation, and Chicago Boosters Publicity Club, a corporation; that at the time they were acting as officers of the said City of Chicago, they were also acting as officers or directors of the aforesaid defendant corporations. It is also alleged that the Muni-

cipal Pier of Chicago was built at a cost of upwards of $5,000,000, and that the City borrowed large sums of money to pay for said pier, and to secure the payment thereof, issued bonds bearing interest at 4 per cent, and for the purpose of paying interest on said bonds, levied taxes on the citizens of the City of Chicago. Further, it is alleged, that the pier is operated as a recreation place for the citizens, and is patronized by large numbers of citizens, and such other persons as may desire to visit the same. That the floor space of the pier is very valuable, and can produce large revenues if rented out to lessees for the transaction of business not inconsistent with the permit of the Federal Government given to said City for the erection of said pier. That portions of space are rented to persons other than the defendants, for large sums of money.

The amended bill also alleges that prior to the 8th day of December, 1920, the defendants, William Hale Thompson, John Dill Robertson, George F. Harding, Jr., B. F. Kelly and Thomas E. Wilson, conceived the idea of conducting an exposition on said Pier, wherein space could be sub-let to exhibitors and large profits could be derived from sub-letting such space, it being known to the defendants that the north and south sides of the upper deck of the Pier contained approximately 600,000 square feet of space. That thereafter, the defendants set out to obtain leases for the north and south sides of the upper deck of said pier, and through their efforts, caused the City Council of the said City of Chicago, to pass ordinances authorizing and directing the making of the leases in question; that at the time the ordinance was passed authorizing the execution

of the lease to the defendant Kramer, it was never intended by the defendants that Kramer was to be the actual lessee, but it was intended that Kramer at some time or other should assign said lease to the defendants, or by some other means cause to be vested in the defendants the lease obtained by him for the north side of the upper deck of the said Municipal Pier; that almost immediately after the passage of the various ordinances, the corporations known as the Pageant of Progress and the Health and Sanitation Exposition were organized as corporations not for pecuniary profit, under the laws of the State of Illinois, and that subsequently, the lease to the defendant Kramer, was either assigned or sub-let to the Pageant of Progress, a corporation, and the lease executed to the Health and Sanitation Exposition was also transferred, assigned or sub-let to the defendant, Pageant of Progress, and that both of said corporations were organized by these defendants, and they subsequently became officers and directors of the two corporations, and at the same time were acting as officers of the City of Chicago. That none of the leases were executed until about the 30th day of June, 1921, and that no rents were paid until the 30th day of July, 1921, and that the rent, for the premises leased to the defendant Kramer, was paid to the City by the defendant, Pageant of Progress, a corporation. That almost immediately after the passage of the various ordinances, the defendants set about to sub-let space to various exhibitors, and that prior to the first day of May 1921, all of the space, consisting of the north and south sides of the upper deck of the Municipal Pier were sub-let to said exhibitors; that no expense was incurred in the sub-letting of the space, and that a large sum of money was received from the various sub-lessee exhibitors as advance rentals prior

to the first day of July 1921, and that the sum of three hundred fifty thousand ($350,000.) dollars was received by the defendant, Pageant of Progress, in payment of rent from various exhibitors for the space for an exhibition period of two weeks; that the space was rented to the exhibitors at $2.50 per square foot for said period of two weeks. That prior to the organization of the company known as the Pageant of Progress and also the Health and Sanitation Exposition, some of the defendants organized as incorporators, the corporation known as Chicago Booster's Publicity Club, and are now either officers or directors of said corporation, and that said corporation was organized under the laws of the State of Illinois as a corporation not for pecuniary profit. That the exposition was conducted on the Municipal Pier from July 30, 1921, until August 14, 1921, upon both sides of the upper deck of the Municipal Pier, and that various wares and merchandise were exhibited by the various exhibitors, and that a charge of 50 cents per person was made by the Pageant of Progress, a corporation, which conducted said exposition, as an admission fee to the exposition; that several hundred thousand persons paid said admission charge, and that there was received in admission fees approximately $450,000; and that by reason of the sub-letting of space and admission fees, the Pageant of Progress has received and will receive upwards of a million dollars from the running of the exposition for the period of two weeks.

The amended bill further alleges that the defendant Thompson knew that the leased premises in question were of great value, and as Mayor of the City of Chicago, should have vetoed the ordinances authorizing the execution of the leases

but, by reason of the fact that he was interested as president of each and every one of said corporations, permitted said ordinances to pass and approved the same. And further, that by reason of the fact that the various defendants were officers of the said City of Chicago, and officers or directors of the various defendant corporations, they used their official capacity for the purpose of representing to the people of the City of Chicago, that the exposition was being conducted as a municipal enterprise. That they caused various letters and pamphlets to be issued purporting to be invitations from the defendant, William Hale Thompson, as Mayor of the City of Chicago, to the citizens of Chicago and elsewhere in the United States, inviting attendance to said exposition; that the defendants have arranged between themselves that all profits derived from the holding of the exposition should be divided equally between the Health and Sanitation Exposition and the Chicago Hoester's Publicity Club; and that these corporations have no interest in said funds, and have no right to receive any of the profits, but that, on the contrary, the profits arising from said exposition are the property of the City of Chicago; that, by reason of the fact that the defendants, William Hale Thompson, John Bill Robertson, Edgar A. Jones and George F. Harding, Jr., at the time of the passing of the ordinances, at the time of the execution of the leases, and at the time of the operation of the exposition, were officers of the City of Chicago, and at the same time officers or directors of the various corporations, said leases were made contrary to law, and are, therefore, null and void; and that the profits derived from the holdingof said exposition are rightfully the profits of the City of Chicago, and

should be turned over to the treasury of the City of Chicago. That by reason of the fiduciary relationship between them as officers of the City of Chicago, fraud was committed on the City of Chicago by these defendants in permitting the execution of the various leases and permitting the passage of the ordinances directing the execution of the same, and that these various defendants committed the fraud as charged, on the said City, for the purpose of procuringprivate gains for themselves, and, therefore, the proceeds of their illegal contracts are the property of the City of Chicago.

The amended bill also alleges that at the time of the organization of the Pageant of Progress, a corporation, there was no money invested and that all moneys received and in the possession of the Pageant of Progress, or in its treasury, are moneys received from the sub-letting of space and from advance fees in the holding of said exposition. That the Pageant of Progress has no assets other than the moneys so received; that the exact amount of the funds received from various sources of the Pageant of Progress is unknown to the complainant by reason of the fact that the books, records and other evidence are in the possession of the defendants as officers of the Pageant of Progress, and that by reason of the fact that the exposition is about over, the various books which would lead to a determination of the exact fund are liable to be diverted or lost, and that, therefore, a receiver should be appointed to take charge of the books, papers, etc. That the other defendant corporations are also corporations organized without any funds or moneys, and that they have no moneys, and will not be able to respond to a money decree, if one is rendered against them,

in the event that the intention of dividing the fund is carried out by the various defendants. That, therefore, a receiver should be appointed to take charge of this money now in possession of the Pageant of Progress, and the various defendant corporations and individual defendants should be enjoined from in any way receiving or disposing of the funds, books and records, until the further order of the court.

In our opinion the trial court erred in sustaining the demurrers interposed by the defendants, to the complainant's amended bill of complaint.

The complainant, as tax-payer, has a right to maintain such an action as that made out by the amended bill. It is provided by section 239, of the Cities and Villages Act (Cahill's Illinois Sts. ch. 24 Sec. 239) that "a suit may be brought by any tax-payer in the name and for the benefit of the City or Village, against any person or corporation, to recover any money or property belonging to the City or Village, or for any money which may have been paid, expended or released without the authority of law. * * *"

Actions similar to the one at bar, instituted by tax-payers, have been sustained by our courts. Such was the case in Perkins v. The Reservoir Park Fishing & Boating Club, et al, 130 Ill. App. 128 where the court held that the statute that confers upon a tax-payer the right to use at law and recover for and in the name of a municipality, any money due it, does not preclude such tax-payer from making application to a court of equity, where he seeks other and further relief than the mere recovery of money or property due the municipality. Other decisions of a similar nature are McCord v. Pike, 121 Ill. 288;

in his trust that the intention of dividing the fund is carried out by the various defendants. That, therefore, a trustee should be appointed to take charge of this money now in possession of the Department of Insurance, and the various Illinois corporations and individual defendants should be enjoined from in any way meddling or disposing of the funds, books and records, until the further order of the court.

In our opinion the trial court erred in sustaining the demurrers interposed by the defendants, to the complainant's amended bill of complaint.

The complainant, as tax-payer, has a right to maintain such an action as that made out by the amended bill. It is provided by section 288, of the Cities and Villages Act (Cahill's Illinois Rev. St. ch. 24 Sec. 288) that "A suit may be brought by any tax-payer in the name and for the benefit of the City or Village, against any persons or corporations, to recover any money or property belonging to the City or Village, or for any money which may have been paid, expended or released without the authority of law. * * *"

Actions similar to the one at bar, instituted by tax-payers, have been sustained by our courts. Thus, in the case of Gardiner v. The Jacksonville Loan Building & Savings Assn., et al., 132 Ill. App. 148 where the court held that the statute that confers upon a tax-payer the right to sue in his own name for and in the name of a municipality, any money due it, does not preclude such tax-payer from seeking assistance in a court of equity, where he seeks other and further relief than the mere recovery of money or property for the municipality. Other decisions of a similar nature are Jackson v. Ely, 141 Ill. 448,

Jones v. O'Connell, 266 Ill. 443; and People v. Halten, 237 Ill. 225. In the Jones case, the court said, "if the defendant, O'Connell, (the county treasurer) has money in his hands which he has no right to retain, but which he is bound to pay to the State Treasurer, the sum retained by him must be made up by taxation, and every tax-payer has an equitable right to see that the money so unlawfully retained, shall be paid to the State Treasurer for the use of the State."

On the facts alleged in the amended bill of complainant, the truth of which we must assume, in view of the demurrers filed by the defendants, we are of the opinion that the leases therein referred to were null and void. Similar leases and contracts have been before our courts and have uniformly been condemned and declared illegal. Sherlock v. Village of Winnetka, 68 Ill. 330; Perkins v. Reservoir Park Fishing and Boating Club, 130 Ia. 128; City of Minneapolis v. Canterbury, 122 Minn. 301; Perle v. City of Lansing, et al, 188 Mich. 501; Bay v. Davidson, 132 Ia. 688; City of Toronto v. Bowes, 4 Grant's Chancery 489; 6 Grant's Chancery 1.

It may be, as counsel for the defendants contend, that in some of the cases cited, the facts alleged were such as to show that the defendants were to profit personally as a result of the transactions there involved, whereas, in the case at bar, there are no such allegations of fact. But, we are nevertheless of the opinion that in the case at bar, the allegations of fact, which the amended bill does contain, are sufficient to make out a case for the complainant and to entitle him to the relief prayed for. We have in mind, particularly, the allegations to the effect that certain of the individual defendants were officials of the City of Chicago and at the same time were officials of the defend-

Jones v. O'Donnell, 4 Ill. 483; and Brooks v. Bruton, 117 Ill. 228. In the Jones case, the court said, "If the defendant O'Donnell, (the county treasurer) has money in his hands which he has no right to retain, but which is in fact in justice to the State treasurer, the sum retained by him must be made up by taxation, and every tax-payer has an equitable right to see that the money so unlawfully retained, shall be paid to the State treasurer for the use of the State."

In the State alleged in the amended bill of complainant, the trust of which we must assume, in view of the demurrer filed by the defendants, we are of the opinion that the issues thereby referred to were mere rules. Similar issues are sometimes here taken before our courts and have uniformly been determined and disposed illegal. Chariton v. Bilbrew et Stanton, 20 Ill. 488; Bunce v. Commrs. for Cook Co. Drainage Dist, 18 Ill. 324; City of Alexandria v. Lightner, 101 Ill. 511; Cole v. Ter. of Dakota, 2 Ill. 124; Ill. Cent. R. R. v. Illinois, 146 Ill. 592; City of Peoria v. Brown, 4 Gurney's Chancery 487; 4 Gurney's Chancery 1.

It may be, as argued by the defendants counsel, that in some of the cases cited, the State alleged were such as to show that the defendants were to profit personally as a result of the transactions there complained, however, in the case at bar, there is no such allegation of fact. But, in the demurrer of the defendant that is the case at bar, the allegations of fact, which the amended bill does contain, are sufficient to raise not a mere for the complainant and to entitle him to the relief prayed for. In this case, particularly, the allegations the City attorney that certain of the individual defendants were officials of the City of Chicago and in the same time were officials of the Drainage

ant corporations; that those of the defendants who were not officials of the City of Chicago, knew that the other individual defendants did occupy these official positions; that certain of the defendants conceived the idea of holding a Pageant of Progress or Exposition, on the Municipal Pier and that such a project would result in large profits; that in that situation the said officials procured the leasing of the upper deck of the Municipal Pier, which was public property, to the said corporations for five years, these leases being two in number and each calling for a rental of $25,000 per year; that these leases were assigned to the Pageant of Progress, which proceeded to sub-let the space to various exhibitors for a consideration of $350,000, for a period of two weeks; that the Exposition or Pageant was thereafter held and resulted in further receipts, in the way of admissions of approximately $400,000; that the Exposition or Pageant was represented to the people of Chicago and Illinois and the country at large, as a purely municipal project; that as a result of the holding of the Pageant or Exposition the defendants received in the neighborhood of one million dollars, which they planned to divide equally between the Chicago Booster's Publicity Club and the Health and Sanitation Exposition. These facts, in our opinion, make out a case for the relief prayed for, without any further allegations showing that the individual defendants were to profit personally in the matter or that any of this money was to find its way into their pockets. Irrespective of what was to be done with this money, by the two corporations referred to, on the facts alleged, they, together with the other defendants, were obliged to account for it and turn it over to the City Treasurer. Public officials are trustees of the public property in their charge, for the people. They may not use that property whether

in collaboration with others or not and thus accumulate funds for any non-public purpose of any sort, and when they do, the transactions involved maybe avoided by the tax payers; the latter may have an accounting and a decree requiring that such funds as may have been realized in the manner complained of, be turned in to the public treasury.

It is contended by counsel representing the defendants, that inasmuch as the defendant officials of the City of Chicago are not shown, by any allegations of fact contained in the amended bill, to have personally acquired any of the profits from these leases, or that such was the intention, it follows that they did not have such an "interest" in the leases as to make them illegal and void. In our opinion, this contention is not tenable. Section 81 of the Cities and Villages Act, (Cahill's Ill. Sts. ch. 24. sec. 81) provides that "No officer shall be directly or indirectly interested in any contract, work or business of the City * * *" It is further provided by our statutes, (Cahill's Ill. Sts. ch. 102, sec. 3) that "It shall not be lawful for any person now or hereafter holdingany office, either by election or appointment, under the Constitution of this State, to become in any manner interested, either directly or indirectly, in his own name or in the name of any other person or corporation, in any contract, or the performance of any work in the making or letting of which such officer may be called upon to act or vote." Dillon in his work on Municipal Corporations, at sec. 773, says:

> "It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which comes within the operation of these principles. Any direct or indirect interest in the subject-matter is sufficient to taint the contract with illegality, if the interest be such as to affect the judgment and conduct of the officer either in the making of the contract

in relationship to with others or not are then communicative those for any reasonable purpose of any kind, and that does in fact, Government institutions particular in the [illegible] the [illegible] Letter may have no accounting and a matter regarding that such [illegible] as our have been failed in the [illegible] etc. be turned in to the public treasury.

It is recognized by general [illegible] in [illegible], that [illegible] as the informant activities of the city of Illinois are not alone. By any allegations of fact contained in the [illegible] or bill, is have personally [illegible] any of the parties from [illegible] Shows, or that such was the intention, it follows that they did not have such or "interest" in the [illegible] or to [illegible] Illegal and void. In our opinion, this [illegible] is not [illegible] bill. Section 23 of the Illinois and Illinois [illegible], [illegible] 8m, 8d, 8m, 8j provides that "No officer shall be directly or indirectly interested in any contract, work or business of the City of" It is further provided by our statutes, (Smith's 1941, Ch. 24, Sec. 1) that "It shall not be lawful for any person or a[illegible] municipal officer, either to [illegible] or associations, under the [illegible] of such [illegible], to become in any manner interested, either directly or indirectly, in his own name or in the name of any other person or persons. In any contract, or the performance of any work in the making or letting of such such officer may be called upon to act in [illegible]." Action in his work as municipal [illegible], in sec. 273, says:

"It is impossible to lay down any general rule defining the nature of the interest of a municipal officer which cause which the regulation of their [illegible] any direct or indirect interest in the subject-matter in sufficient to point the contract with illegality, if the interest be such as to affect the judgment and [illegible] of the officer either in the making of the contract

or in its performance. In general, the disqualifying interest must be of a pecuniary or proprietary nature. Contracts with firms in which a member of the council or other municipal officer is a partner fall within the principle, and the interest of the officer therein will taint any such contract with illegality. A member of the City Council or other Municipal Officer is interested in a contract so as to taint it with illegality when the contract is made with a corporation of which he is an officer and under some circumstances with a corporation of which he is a stockholder."

McQuillen, in his work on Municipal Corporations, Vol. 2, sec. 513, says:

"Experience has shown that public opinion alone is not sufficient to prevent the tendency to abuse in the manner under consideration. Therefore, the authoritative and ancient express prohibition 'Thou shall not' has been incorporated into the American Municipal system, in order to correct corrupt tendencies, and the courts, with unanimity, enforce the high morality of official conduct by unhesitatingly characterizing such abuses as public wrongs, calculated to utterly destroy faithfulness and integrity in public service."

It is the further contention of the defendants that these leases were valid because they were entered into "openly" and also that the complainant failed to make out a case by the allegations in his amended bill, by reason of the fact that he does not allege that those of the defendants who were officials of the City of Chicago and also officers of the defendant corporations, "constituted the entire membership in these corporations, nor any material part thereof", and the point is also urged that such profits as were realized from the Pageant of Progress, "if any, were to be given and were given to corporations" not for profit, and further that the profits alleged to have been received by these corporations were not "clear profits". In our opinion, all of these matters are wholly beside the question at issue. That the corporations involved were corporations "not for profit" is quite immaterial. The use which

of life particularly. In general, the disparaging
treatment must be of a peculiary or perplexing de-
bate. Confronted with fiction as stark a number of the
economic or other consistent effects is a perhaps fail
which the principle, and the interest of the effects
should will bring any such contract will liquidity.
a member of the City Council or other municipal of-
ficer is interested in a contract to do in being it
with liquidity when the contract is made with a pro-
position of which he is an officer and under who con-
sideration with a corporation of which he is a share-
holder.'

Equation, in his work on Contract Principle,

Vol. 2, sec. 612, says:

"Disputations has shown that public contracts
is not sufficient to prevent the tendency to share
in the current under consideration. Therefore, the
authoritative and modern empirical principle 'Ex-
ploit not' has been incorporated into the constitution
financial system, in order to protect society from
dangers, and its course, with considerably, motive
the high morality of artificial economy. By numerous
strict characteristic with adhere to public errors,
associated to strictly enforce facilities and in-
terest in public matters."

It is in the further examination of the introducts that
these issues were still between they were material like 'clearly'
and also that the complainant failed to make out a case by the
allegations in his amended bill, by reason of the fact that
he does not allege that those of the defendants who were officials
of the City of Toronto and also officers of the federal gov-
ernment, "constituted the entire membership in their respective
class, nor are material part thereof", and the point is also
argued that such profits as were realized from the payments of
Engineers, "if any, were to be given and were given to corporations
other and for profit, and further that the writer alleged
to have been involved by their representations were not "claims
proper". In the result, all of these factors are clearly has
side the question at issue. That the determination involved were
determinations "not for profit" is quite immaterial. The sec which

was made, in the manner described, of public property, was an illegal use, entirely apart from that question.

In further support of these leases, the defendants contend that under the allegations of the amended bill, it is not shown that the lessees assigned these leases for a materially increased rental, in which case counsel admit in their brief, "there might be some opportunity for the complainant to contend that such a profit belonged to the City." Inour opinion, the allegations contained in the amended bill are to the effect that, at least in part, the defendants derived their alleged profits from increased rentals at the Pageant of Progress. That these exhibitors were willing to pay such rentals by reason of the fact that the defendants "guaranteed" large attendances at the Pageant, is neither indicated by any allegations to be found in the amended bill, nor would the fact be material, in any event.

In our opinion, whatever moneys have come into the hands of any of the defendants through the leases above referred to, whether by means of rentals or of admissions or other receipts derived from the Pageant of Progress, in any way, belong to the City of Chicago and, on the allegations found in this amended bill, complainant is entitled to have these profits accounted for and turned over to the City of Chicago.

In the City of Toronto v. Bowes, supra, the Mayor of Toronto had made profits on the purchase and sale of certain municipal bonds under such circumstances as to make the issue and sale of the bonds void, and the court held the Mayor was bound to account for such profits and he was directed to turn over to the City all money received by him by reason of his dealing in bonds.

In City of Minneapolis v. Janisarbury, 144 Minn. 301, the court held that an officer of a public corporation is liable to account to the corporation for any profits which he made in a contract with the corporation in which he was personally interested. Judevine v. Hardwick, 49 Vt. 180, is to the same effect. In United States v. Porter, 217 U.S. 286, the Supreme court held that a bill for an accounting would lie against an army engineer in charge of certain harbor improvements who had received from the contractors, a proportion of the profits realized by them under their contracts with the government. To the same effect are the decisions in Village of Dwight v. Palmer, 74 Ill. 295, and McCarthy v. City of Bloomington, 127 Ill. App. 215.

But the defendants contend that there are not facts alleged in the amended bill showing that any profit has been derived or is to be derived by any defendant personally. That is quite immaterial. The bill alleges that the defendants "have arranged between themselves that all the profits * * * shall be divided equally between the defendants Health and Sanitation Exposition and Chicago Booster's Publicity Club ", two of the corporations "not for profit."

The bill recites that Thompson, Robertson, Wilson and Kelly, incorporated the Pageant of Progress; that Thompson, Robertson and Jonas incorporated the Health and Sanitation Exposition; that Thompson, Harding and Kelly incorporated the Chicago Booster's Club; that the individual defendants who were not officials of the City of Chicago knew that Thompson, Robertson, Harding and Jonas were officials of said City; that municipal employees were used by the defendants on the Municipal Pier in connection withthe Pageant of Progress; and that such

In City of Greenville v. Thompson, 114 Ohio, 641, the court held that an officer of a public corporation is liable to account to the corporation for any profits which he makes in a contract with the corporation in which he was personally interested. Anderson v. Dawkins, 42 Fla. 232, is to the same effect. In United States v. Mitchell, 217 U.S. 269, the Supreme court held that a bill for an accounting would lie against an agent employed in obtaining of certain Indian allotments from the Government, a participant of the profits realized by them under their contracts with the government. To the same effect are decisions in Williams of Tobias v. Johnson, 94 Ill. 268, and Lawrence v. Trustees of Dartmouth College, 227 Ill. App. 221.

But the defendants contend that there are not facts alleged in the amended bill showing that any profit has been derived or is to be derived by our authorities personally. That is quite immaterial. The bill alleges such the relations there exists between Commission and all the officers - - - - shall be strictly equally between the authorities (which are fulfilling Depositions and Salvage Department Publicity Club ", law of the corporations that for profit.

The bill recites that Commission, Johnson, Stone and Daily, concerning the subject of Publicity for Commission, Johnson and Land Institute (the Social and Conditions Department) that Commission, Daily and Daily incorporated the Citizen Bureau's claim that the individual defendants are mere officials or the tool of Citizen Bureau that Commission, Johnson and, Stone were officials of said Citizen Bureau, Stone and other activities were by the defendants as the municipal plan in connection with the Commission and that such

Pageant was advertised through proclamations issued by the Mayor of Chicago and the Governor of Illinois, as being held by the City of Chicago as a municipal project.

In our opinion, these facts are such as to charge the defendant corporations and the individual defendants, not officials of the City, with the knowledge of the fact that the other defendants were such officials and that the interest of the latter in the leases in question, was such as to invalidate them and that on these facts, the corporations, as well as the individual defendants, are liable to account for whatever moneys have come to their hands, as a result of the execution and assignment of these leases and the holding of the Pageant of Progress Exposition and to turn such moneys in to the treasury of the City of Chicago.

For the foregoing reasons the decree appealed from is reversed and the cause is remanded to the Circuit Court for further proceedings not inconsistent with this opinion.

DECREE REVERSED AND CAUSE REMANDED.

TAYLOR, P.J. AND O'CONNOR, J. CONCUR.

Opinion filed July 9/23

123 - 27957

MATTHEW P. BRADY,
Appellant,

vs.

REVERE MOTOR SALES COMPANY,
a Corporation,
Appellee.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

Order reversed

230 I.A. 669

MR. JUSTICE JOHNSTON DELIVERED THE OPINION OF THE COURT.

This is an appeal by Matthew P. Brady, appellant, from an order of the Circuit court of Cook County sustaining a motion in the nature of a writ of error coram nobis under section 89 of the Practice Act, to vacate a judgment rendered against the Revere Motor Sales Company, appellee. The judgment was obtained by appellant in an action of assumpsit to recover attorney's fees for services alleged to have been rendered by appellant as attorney for appellee. Appellee failed to plead to the declaration, and judgment by default was taken against it in the sum of $2800 and costs. During the term at which the judgment was entered, the court, on motion of appellee, supported by an affidavit alleging, among other things, a meritorious defense, vacated and set aside the judgment and ruled appellee to plead. Appellee pleaded to the declaration, but failed to file an affidavit of merits. On the petition of appellant a change of venue was granted; and thereafter, on motion of appellant, the pleas of appellee were stricken from the files for failure of appellee to file an affidavit of merits, and appellee was defaulted. The court found from the affidavit of claim of appellant that there was due appellant from appellee the sum of $2800; and the court entered judgment on the finding. At a subsequent term appellee filed a motion and petition in the nature of a writ of error coram nobis to vacate and set aside the default and judgment.

Opinion filed July 7/57

No. 57-1.

Gentlemen:

Appellant,

vs.

Appellee.

Appeal from Circuit Court
of Cook County.

Mr. Justice Schaefer delivered the opinion of the court:

This is an appeal by Delbert J. Neely, petitioner, from an order of the Circuit Court of Cook County sustaining a motion to the nature of a writ of error coram nobis which challenges a judgment rendered, in effect, a judgment revoking defendant's parole. Defendant Tempery, director, the Parole Board was dismissed by agreement in an action of mandamus in Superior Court's view the motions dismissed. Appellee failed to appear in the proceedings, and petition by petitioner was taken against it in the case of Ethel Neely. Should the task of this the judgment the counsel, the court, on motion of appellee, supported by an affidavit setting forth, among other things, a meritorious defense, vacated and set aside the judgment and ordered appellee to plead. Appellee pleaded in the negative, but failed to file an affidavit of merits. On the motion of appellee a change of venue was granted and thereafter, on motion of appellee, the clerk of Winnebago Cook entered from the file the failure of appellee to file an affidavit of merits, and appellee was defaulted. The court found from the affidavit of claim of appellant that there was due diligence from appellee the cause of action and the court entered judgment on the finding. At a subsequent term appellee filed a motion and petition to the judgment of a writ of error coram nobis to vacate and set aside the default judgment.

A number of grounds are stated in support of the motion and petition, but it will not be necessary to consider them specifically as the main reliance of appellee rests upon the facts alleged in an amendment to the original motion and petition. The substance of the amendment is as follows: That on the hearing of the motion of appellee to vacate and set aside the first default and judgment entered against it for want of a plea to the declaration, appellee was represented by Willis Melville and Harry B. Miller, and that appellant Matthew F. Brady appeared as attorney for himself; that after the judge who presided at the hearing had granted the motion and had ordered that leave be given to appellee to file a plea instanter to the declaration, "the said Willis Melville said to the court that he would file a plea for the defendant at once and asked the court if it would be necessary to file with said plea another affidavit of meritorious defense besides the one then filed on said motion, and the sufficiency of which the court had already passed upon, to which question the court replied that he could see no reason for requiring the defendant to file another affidavit of meritorious defense and that he need not do so; that while said Willis Melville was thus addressing the court in this regard the said Harry B. Miller stood alongside of the said Willis Melville at the bar of said court and that said Matthew F. Brady also stood at the bar of the court and by the side of said Willis Melville and the said Harry B. Miller, and that while the court stated that he could see no reason for requiring the filing of another affidavit of meritorious defense, and that defendant need not do so, he, the said judge, looked directly at the said Brady, and addressed his remarks to the said Brady, as well as to the said Melville, but that said Brady then and there made no reply nor made any objection to the said plea being filed without another affidavit of meritorious defense being filed when said plea was filed;" that the plea of

appellee was filed but that appellee, relying on the statement of the court that an affidavit of merits was unnecessary, did not file such an affidavit with its plea. Appellant demurred to the motion and petition of appellee. The demurrer was overruled, and the appellant prayed an appeal to this court.

It will be seen from the statement of the case that the judgment which appellee is seeking to vacate by the motion in the nature of a writ of coram nobis, was the judgment by default obtained against appellee for failure to file an affidavit of merits. The judge who entered that judgment was not the same judge who, in setting aside the first judgment which was obtained by default for want of a plea by appellee and allowing appellee to plead, made the statement to appellee that in view of the fact that an affidavit alleging a meritorious defense had been filed with appellee's motion to vacate the judgment, it was unnecessary for appellee to file an affidavit of merits with its plea.

The only question in this case is, whether the statement made by the judge to counsel for appellee in the presence of appellant, was a fact which, if known to the judge who entered the judgment by default, would, as a matter of law, have precluded the entry of the judgment. If it would have precluded the entry of the judgment as a matter of law, the judgment may be vacated by a motion in the nature of a writ of coram nobis under section [illegible] of the Practice Act. If it would not have precluded the entry of the judgment as a matter of law, then the motion will not lie. If it was not an "error in fact" within the meaning of section [illegible] of the Practice Act, it is immaterial whether the judge who entered the judgment sought to be vacated by the motion, had knowledge of the fact or not. If it was an "error in fact" within the meaning of section [illegible], and was unknown to the judge at the time he entered the judgment, then the motion to vacate the judgment must be sus-

tained. Section 89 of the Practice Act provides that all errors of fact, committed in the proceedings of any court of record, and which, by the common law, could have been corrected by said writ, may be corrected by the court in which the error was committed, upon motion in writing, made at any time within five years after the rendition of final judgment in the case upon reasonable notice.

In construing section 89 it has been held in Chapman v. North American Ins. Co., 292 Ill. 179, 183, that the error of fact which may be assigned by motion "must be some fact unknown to the court at the time judgment was rendered, as well as one which would have precluded the rendition of the judgment." The court said that familiar examples of such facts are "that the nominal defendant was dead, an infant without a guardian, a feme covert or a person insane at the time of the trial."

In our opinion the statement of the judge was a mere personal expression of his idea of what the law was relating to a question of practice. The statement was not made in his judicial capacity, but was given simply as his own opinion concerning the enquiry of counsel for appellee. It was in no way involved in the judicial proceeding before the court, and in that sense it was purely an extra-judicial utterance. Counsel for appellee was merely asking the court for advice on a point of practice, and the court gave him an informal opinion.

Counsel for appellee contend that the attorneys for appellee were not negligent in relying on the statement of the court; that "attorneys have a right to rely upon the statements and announcements of the court, when on the bench, to the same extent that they may rely upon the rules of court." The correctness of the conclusion of counsel depends entirely on the character of the statements made by the court. Obviously all "statements and

announcements of the court when on the bench" cannot be relied on by attorneys. Advice given to attorneys, which the court is under no legal obligation to give and which is directly contrary to the provisions of a statute, could not be relied on as an excuse by the attorneys for not complying with the statute. If such advice could be relied on, it would follow as a consequence that the court could nullify a statute. Counsel for appellee was under duty to look to the Practice Act for the information that he was seeking, and he had no right to rely on the informal opinion of the court. The cases cited by counsel for appellee do not support his contention that he had a right to rely on the statement of the court. In the case of McMurray v. Peabody Coal Co., 240 Ill. 318, cited by counsel for appellee, the court held that an attorney had the right to rely on the announcement of the court made at an adjournment of court that "no action would be taken in the" proceedings "without actual notice to" the attorney. That case involved a motion to set aside a default and for leave to plead. The language quoted from the case and relied on by counsel for appellee to the effect that "counsel had the right to rely upon the announcements of the court to the same extent that they may rely upon the rules of court" applied to the particular announcements involved in that case. The court did not hold, as counsel for appellee seem to imply, that all announcements made by a court may be relied on by attorneys. The facts in the remaining cases, cited by counsel for appellee on this point, need only to be stated in order that it may appear that the cases do not apply. In Jean v. Kennessy, 74 Ia., 348, an attorney relied on the assurance given him by the judge that nothing further would be done in the case without notice to the attorney. In Sanders, Adm. and others v. Hall, 37 Kas. 271, an attorney relied on the statement of the court that the attorney could have a certain time within which to plead. In Hatlif, Executor, v. Baldwin, 79 Ind. 16, an attorney relied on

[illegible] of the court which on the bench' quoted by relied on by attorney. Article given to attorney, which the court is under no [illegible] to give and which is directly contrary to the provisions of a statute, could not be relied on as an excuse by the attorney for not complying with the statute. If such advice could be relied on, it would follow as a consequence that the court could nullify a statute. Counsel for appellee was under duty to know in the [illegible] the information that he was seeking, and he had no right to rely on the informal opinion of the owner. The cases cited by counsel for appellee in not support his contention that he had a right to rely on the statement of the owner. In the case of Commonwealth v. Pendleton Coal Co., 234 Ky. 817, relied by counsel for appellee, the court held that an attorney had the right to the consideration of his client's [illegible] ment of counsel that "no motion would be taken in the" proceedings "without actual notice to" the attorney. That case involved a motion to set aside a default and for leave to plead. The language quoted from the case and relied on by counsel for appellee in the effect that "counsel had the right to rely upon the assurances of the court to the same extent that they may rely upon the word of counsel" applied to the prosecution commencements involved in that case. The court did not hold, as counsel for appellee seem to imply, that all commencements made by a court may be relied on by attorneys. The facts in the preceding cases, relied by counsel for appellee on this point, need only to be stated in order that it may appear that the cases do not apply. In Ison v. Commonwealth, 74 Ky., 134, an attorney relied on the remarks given him by the judge that no[illegible] trial would be done in the case without notice to the attorney. In Commonwealth, [illegible] and Mining v. Hall, 27 Ohio, 273, an attorney relied on the statement of the court that the attorney could have a certain time within which to plead. In Smith, Executor, v. Bulkley, 59 Ind. 18, an attorney relied on

the announcement of the court "that the case would not be tried at that term." In ex parte Heflin, 54 Ala. 90, an attorney relied on the statement of the court that no other litigated case would be tried during the term. In Pickens v. Fox, 96 N. C. 369, an attorney relied on the statement of the court "that it was not probable that anything whatever would be done on the civil docket."

Counsel for appellee further maintain that "an attorney cannot stand by and hear what the court may say or do, and by making no objection induce the court or other counsel in the case to rely upon the action taken, and then later take advantage of the situation." In support of their contention they cite the case of Lally v. The New Union, 138 Ill. App. 450. In that case, while reading an instruction of appellant, the court corrected it with the consent of counsel for appellant. It was held that appellant could not complain of the instruction. It is obvious that this case is not in point. In the present case appellant's silence can not be considered as inducing counsel for appellee to rely upon the statement by the court. It may be that at the time the court made the statement appellant did not know that the court was mistaken. The argument of counsel involves the assumption that appellant was under duty to inform the court that the informal opinion of the court was not correct; and further, that appellant knew at the time that the court was in error. Counsel for appellee argue that "it is safe to assert that had the court ~~s~~ known what the attorney for the plaintiff knew, the judgment by default in question would not have been rendered." This contention of counsel, however, is not based on the law governing a motion in the nature of a writ of coram nobis. The question is not what a particular judge might have done if he had been apprised of the facts, but whether, as a matter of law, the facts, if known to any judge, were sufficient to have precluded the entry of the judgment.

The case of Luken v. I. S. & M. S. Ry. Co., 154 Ill.

the announcement of the court "that the case would not be tried at that term." In re Grand Jurors, 94 Ark. 93, an attorney relied on the statement of the court that no other litigated case would be tried during the term. In Fleming v. State, 99 S. W. 360, an attorney relied on the statement of the court that "Court is not ready to entertain motion to set aside of the court that it had made orders that arresting witnesses made by him on the civil docket," [illegible] discussed the mandatory [illegible] that "an attorney cannot plead by anticipation that the court may or do, and by making an objection before the court an order granted in the case by over the motion taken, and then later disregarding of the action." In support of their contention they cite the case of Kelly v. The Gas Trustees, 108 Ill. 403, in that case, while ruling on instructions of counsel, the court commented it was the duty of counsel for appellants. It was held that appellants could not complain of the instructions. It is obvious that this case is not in point. In the present case appellant's attorney can not be considered as indulging counsel for appellee to rely upon the statement by the court. It may be that at the time the court made the statement appellant did not know that the court was mistaken. The objection of counsel involves the consideration of the matter not to inform the court that the material opinion of the court was not correct; and further, that appellant knew at the time that the court was in error. Counsel for appellee argue that it is made to appear that his client was in error. Counsel for appellee argue that for the plaintiff here, the judgment by default in question could not have been rendered." This contention of counsel, however, is not based on the law governing a motion to the motion of a writ of common notice. The question is not such a particular judge might have done if he had been apprised of the facts, but whether, as a matter of law, the Court, if bound to be judge, was justified in have granted the motion of the judgment.

The case of Lewis v. Ga. R. & B. Co., 114 Ill. 111, [illegible]

App. 350, cited by counsel for appellee, involves a situation wholly different from the present case. In that case the court said that an attorney would not be allowed to take advantage of an error of the court induced by the attorney's own conduct. In the present case counsel for appellee, and not appellant, induced the court to express the informal opinion on the point of practice in question.

It is further maintained by counsel for appellee that appellant is guilty of fraud and deception in not informing the judge before whom the judgment now sought to be vacated was taken, of the statement made by the former judge.

We are of the opinion that the facts in connection with the statement of the former judge are not "errors in fact" within the meaning of section 89 of the Practice Act, and that, therefore, it is wholly immaterial whether the facts were disclosed to the judge who entered the judgment sought to be vacated or not. If they had been brought to his knowledge they would not have been, as a matter of law, sufficient, of themselves, to defeat the entry of the judgment. These facts are clearly not of a similar character to the examples of "errors in fact" in the sense of section 89, given by the court in the case of Chapman v. North American Life Ins. Co., supra, such as death of the nominal defendant, infancy without a guardian, disability of coverture, or insanity at the time of the trial. In the cases cited by counsel for appellee in support of his contention of fraud and deception on the part of appellant, the facts are materially different from the facts in the present case. Counsel for appellee say that the cases are not "exactly parallel in facts to the one presented." The cases are not only not "parallel," but are not applicable in principle.

In the case of Chapman v. North American Life Ins. Co., 212 Ill. App. 289, cited by counsel for appellee, the court held that affidavits filed in the case setting up facts constituting

purely matters of defense, on the theory that if they had been called to the attention of the court the judgment could not have been recovered, do not establish fraud warranting the vacation of a judgment by default. Counsel for appellee quote language from the opinion of the court, which merely states, by way of illustration, what would constitute fraud.

In the case of The People v. Noonan, 276 Ill. 430, cited by counsel for appellee, an affidavit in support of a motion in the nature of a writ of error coram nobis to set aside a judgment, alleged that neither Noonan nor his attorney was present in court when a judgment order was signed, and that the recital in the order that they were present was incorrect. The court held that the motion would not lie to contradict the record, even though the facts stated, if true, tend to show fraud.

In the case of Foote v. Dennin, 87 Ill. 33, cited by counsel for appellee, the courtheld that the attorney was guilty of fraud who in violation of a stipulation took a judgment by default. The case of Fry v. The American Ins. Co., 158 Ill. App. 334, cited by counsel for appellee, is to the same effect as the case of Foote v. Dennin, supra. The case of Tucker v. Jones, 59 Tenn. 333, does not appear in the volume of reports cited by counsel for appellee. From counsel's statement of the case it seems that the court held that the attorney for the plaintiff, who took a default against the defendant for want of a plea, was guilty of fraud because he failed to file a plea in behalf of the defendant which had been handed to him to file and which he promised to file. In the case of Thompson v. Connell, 31 Ore. 231, cited by counsel for appellee, it was held that an attorney was guilty of fraud who took a judgment by default after having agreed with the defendant to extend the time to answer. In the case of Illinois Steel Co. v. Rautenbach, 67 Ill. App. 289, cited by counsel for appellee,

policy matters of defense, on the theory that if they had been misled in the activities of the penal the personal consti-ment were been recovered, do not relaxation fixed necessarily the violation of a judgment or default. Counsel for appellant argue Judgment from the relation of the Judge, right notify always, by way of Illinois-Ohio, what would constitute fraud.

In the case of The Florida v. Bennett, 177 Ill. App. ated by counsel the opinion, on affirmative on support of a petition in the matter of a writ of error coram nobis to set aside a judgment, alleged that addition Counsel had a adjudged was present an order to a felonious right was signed, not that the testimony in the order that they also present was Interpret. The court held that the motion would not lie to contradicts the motion, even though the facts which, if true, had be for fraud.

In the case of Jones v. Jones, 47 Ill. 90, cited by counsel for appellee, the contrary that the chancery was guilty of fraud who is violation or a stipulation than a judgment by the Court. The case of Ex v. The Municipal Ct. Ill. App. 1st Dist., cited by counsel for appellee, is in the same effect as the case of Fowle v. Chicago, supra. The case of Jones v. Jones, 3 Ill. 90, also cited by counsel for appellee. This opinion's statement of the case is misleading. This opinion's statement of the case is misleading because that the court held that the chancery for lack jurisdiction, was take a direct against the Interest that what of a fine, the policy of final Judgment for Fraud. If this a case in Court of the defendant which had been bended in his in this and which be produced in this, in the case of Thompson v. Jones, 22 Ore. 301, cited by counsel for appellee, it was held that an attorney was guilty of fraud who had a judgment by default after having agreed with the defendant to extend the time to answer. In the case of Illinois Bank of v. Dickerson, 67 Ill. App. 588, cited by counsel for appellee,

a verdict was set aside on the ground that a man fraudulently succeeded in having himself accepted as a juror by personating one of the listed jurors. In Petrakos v. Hanik, case No. 27055, opinion filed in this court June 26, 1928, and not reported, cited by counsel for appellee, the facts were that the case was heard without notice out of its regular order, and without being placed on the trial calendar.

It is further contended by counsel for appellee that the record shows that the "fiduciary relationship" of attorney and client exists in this case and, therefore, a more liberal application of the rule as to granting a motion in the nature of a writ of error coram nobis should apply. It does not appear from the record that such a relationship exists. Appellant does not appear as attorney for appellee but as an adversary of appellee. Furthermore, counsel for appellee in their brief refer to appellee as a "former client" of appellant. Counsel for appellee maintain that the "rigor of the rule" should be relaxed where it appears from the record that appellant admits that appellee "has an absolute and valid defense to the claim for legal services." The question of the defense of appellee cannot be considered on a motion in the nature of a writ of error coram nobis. Chapman v. North American Ins. Co., 298 Ill. 170, 168.

For the reasons stated the order entered by the Circuit Court of Cook County on the 16th day of June A.D. 1922, is reversed and the cause is remanded to the said Circuit Court with directions to sustain the demurrer of plaintiff to the amended motion of defendant to vacate the judgment in favor of plaintiff in said cause, and for further proceedings according to law.

REVERSED AND REMANDED WITH DIRECTIONS.

McSurely, P. J., and Matchett, J., concur.

General No. 7538 Agenda No. 41

October Term, A. D. 1922

Adelia M. Stickel, Appellee,

vs.

Simon A. Niebuhr, Executor, Appellant.

Appeal from Logan.

HEARD, J.

It appears from the abstract in the case that it is an appeal from "a judgment on verdict in favor of claimants, Adelia M. Stickel, for the sum of $4,340.00 and costs of suit and against Simon A. Niebuhr, Executor of the last will and testament of Simon Niebuhr, deceased, to be paid in due course of administration." The abstract is barren as to any history of the suit, its origin, the nature of the case, the pleadings or what the issues were upon which the verdict was rendered.

It is a well settled rule of law in this state that a court of review will search the record for grounds upon which to affirm a case, but will not do so to find error and it has been repeatedly held by this court that where the abstract is so imperfect as to render it impossible to acquire from it any correct idea of what transpired in the court below the judgment will be affirmed pro forma. P. S. G. & E. Co. vs Wrede, 217 Ill. App. 407. In re Smalley, 217 Ill. App. 488; Sellers vs P. P. Co. 217 Ill. App. 617.

The judgment is affirmed.

General No. 7539 Agenda No. 62

October Term, A. D. 1922

Anna Zorger, Appellee

vs.

Charles M. Wood, George Zorger and Mary Zorger

Charles M. Wood, Appellant

Appeal from McLean

HEARD, J.

This is an appeal by Charles M. Wood from a decree of the Circuit Court of McLean County, in an action brought in Equity for an accounting.

The evidence in the case shows that Charles H. Zorger, husband of appellee died August 27, 1913, leaving a last will and testament which was duly probated; that in and by his will he bequeathed to appellant, Wood, in trust for appellee and his children, George and Mary Zorger, who were infants, all of his personal property; that by the terms of said will Wood was appointed executor, with power to sell and convert any and all property of every kind and nature into money and that the proceeds thereof should be held by him in trust for the use and benefit of the wife and children, giving said trustee full power to control the same as trustee until the youngest child should arrive at the age of twenty-one years; that among the assets belonging to the estate was a certain drug store and fixtures in the Illinois Hotel building in Bloomington, Illinois; that the said executor prepared no statement, invoice or inventory of the specific articles of said stock at any time and that the said executor continued to operate said business for a period of about five years from the time he took charge of said estate; that there were other items of personal property consisting of cash in bank of $3,171.67, accounts receivable $781.31, which were collected by the executor; that the executor owed the estate the sum of $525.00 at the time of the death of the said Charles H. Zorger, and that the total fair value of all the personal property taken over by the said executor was at least eleven

thousand dollars; that Wood lived at Danville but went to Bloomington to look over the accounts and business only occasionally. He testified that the business was

run at a loss almost from the first, but in August, 1915, filed a petition in the County court, without notice to the heirs, setting up that he had been running the business at a profit and asking permission, which he received, to continue it. In his inventory as executor in the County Court, the value of the stock and fixtures was stated at $10,000. The stock and fixtures were sold at public sale for $1900.00. The evidence shows that at no time did appellant make any report of the receipts and disbursements of the business and no books of the business appear from the abstract to have been produced on the hearing.

In this state of the record the court in stating the account properly charged appellant with the sum of $11,000 which was made up of $3,171.67 in cash;$ 781.31 accounts collected; $525.00 due from apepllant to deceased at time of death and the balance was the estimated value of the fixtures and stock of goods, which estimate was a very conservative one. As against these charges the court allowed appellant credits amounting to $7001.88 including $660.00 commission at 6% on $11,000 and found that on an accounting upon the personal property account, $3,998.12 which with interest from September 1, 1914 to December 1, 1921, amounted to $5,572.33 was due from appellant.

We are of the opinion that the court was fully justified in so stating the account.

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In Teater vs. Salander, 305 Ill. 17 in construing a will which contained a provision which authorized he executor and trustee to sell all testator's real estate "at such times as he may think best for the interest of my estate," it was said.

"Although the testatrix died in November, 1918, the report of the appellee as executor, filed March 21, 1921, stated that he had not considered it best to sell the real estate up to that time, and so far as the record shows he has made no effort to sell it, although it is well known that the period that elapsed was one of high prices in real etsate. In his report as executor he gives no reason for not having sold or attempted to sell the real estate, other than he did not consider it for the best interest of the estate. It appears, also that up to that time he had

made no payments of any income either to Zinna Teater, the daugther of the testatrix, or to Deward Teater, Zinna's son, after her death, although the record does show that he made a report of accumulations, and paid to appellant, as guardian, $567.90 some time after the filing of appellant's bill herein. The will gave no direction as to when the land should be sold and the court should have construed that provision in it. While the appellee is given the right to exercise his judgment as to when the sale should take place, the direction to sell is positive, and he does not have the right to determine whether or not it shall be sold at all; nor has he any right, merely under the pretense of exercising the discretion vested in him, without a valid reason therefor, to refuse to sell for an indefinite period of time. It is evident from a reading of the provisions of the will that the testatrix intended that her real estate should be sold and one-half of the residue become a trust fund for the benefit of the daughter and later for the benefit of the heirs of her body. Nowhere in the will is there any direction that he shall continue to rent the farms longer than necessary in order to procure an advantageous sale. Where the direction to an executor to sell and convert

real estate

into personal property is explicit it becomes his duty to follow such direction. (Lash v. Lash, 209 Ill. 595; Greenwood v. Greenwood, 178 id. 387.) While no time for the sale was fixed by the terms of the will, it was undoubtedly the intention of the testatrix that the sale be made as soon as it could be done consistently with the best interest of the estate. It is well established that where positive directions are given to do an act but no time is fixed in which the same shall be performed, it is incumbent upon the donee of the power to exercise the same within a reasonable time. What is a reasonable time depends, of course, upon the circumstances showing what is to the best interest of the estate, (Dingman v. Beall, 213 Ill. 238,) but in the absence of any showing on the part of the appellee as to why he delayed carrying out the exercise of his power for a period of more than two and a half years, we are of the opinion that it was error on the part of the court to refuse to give directions per-

taining to such sale.

Appellant also urges that he is entitled to an accounting. It was the duty of the executor to settle the estate as required by law. As soon as the debts were all paid he should have closed his account with the county court as executor and turned over to himself, as trustee, any proceeds that remained after the approval of his final report by the court. (Wylie v. Bushnell, 277 Ill. 484.) Appellee did not close the estate in the county court. The circuit court did not have power, under this bill to compel him to do so. This does not give him a right, however, by continuing indefinitely as executor, to thereby avoid the necessity of accounting for proceeds coming into his hands as trustee. The chancellor should have required an accounting.

At the time of his death Zorger was the equitable owner of 290 acres of land in Harris county, Texas, the title of record being in appellant who was his brother-in-law. After the death of Zorger, appellant traded the Texas land for a house

and lot in Urbana, which was subject to a mortgage of $5000.00 and the Texas land was subject to a $3000.00 mortgage. In this trade appellant invested $700.00 of his own money. The court found and his finding is fully supported by evidence that at the time of this trade the Urbana property was reasonably worth $6,500.00, which would give the Zorger estate an $800.00 equitable interest in the property. During the pendency of these proceedings appellant traded the Urbana property for a property in Fairfield, Illinois. The court found that at the time of the latter trade, and his finding is fully supported by the evidence, the value of the Urbana property was $9,500.00 and that upon a settlement of the accounts with reference to this property, appellant should account to the Zorger estate for $2400.00 and interest from May 19, 1921, making a total amount due on the accounting with reference to the Texas land of $2,529.78, which made a total amount of $8,102.11, which the court decreed appellant to pay to a new trustee.

It is contended by appellant that that part of the decree holding appellant liable for supposed profits made

by trading the Texas land for the Urbana property and then trading the Urbana property for other property, for which a decree against appellant was rendered for the sum of $2,529.78 is entirely unsupported by any averment in the bill of complaint.

It is averred in the bill of complaint that the Texas land was inventoried as belonging to deceased. The bill also states that complainant did not know anything about the condition of the Texas property which was supposed to be for his benefit.

It prayed for an accounting by the trustee and for general relief and is sufficient to authorize the court to grant the relief given by the decree. Crawford v. Hurst, 299 Ill. 503.

The decree removes appellant as trustee and it is contended that this action was not justified. When appellant entered upon his trust he went into possession of personal assets belonging to the estate, which the court found to be worth $11,000.00. At the end of about five years of trusteeship

he claimed that the estate was owing him. His administration of the trust was certainly not very successful and we are of the opinion that the court was fully justified in removing him and appointing a new trustee.

In Wylie v. Bushnell, supra, it is said: "The question whether trustees appointed by will or deed will be removed for neglect of duty or breach of trust must necessarily be addressed to the sound discretion of the court, whose determination must depend largely upon the circumstances of each particular case."

We have examined all the points raised by appellant and find no reversible error in the record.

The decree is affirmed.

General No. 7542 Agenda No. 44

October Term, A. D. 1922

Everett E. Douthit and J. Frank Rose, Appellees

vs.

E. T. Swiney, Appellant

Appeal from Shelby.

HEARD, J.

On November 12, 1920, appellant sold to J. Frank Rose, a one-fourth interest in a garage business and on December 8, 1920, he sold to Everett E. Douthit a half interest in the same business and entered into a separate written partnership agreement with each of them. On March 7, 1921, appellees filed their bill of complaint in the Circuit Court of Shelby County, alleging that they had been induced to enter into these agreements by appellant's false and fraudulent representations as to an inventory of the assets of the business and that appellant had appropriated funds belonging to the partnership greatly in excess of his proportionate share. The bill asked for a dissolution of the partnership, the appointment of a receiver, and that appellant be decreed to pay appellees whatever may be equitably due them.

Appellant answered denying all charges of misrepresentations and misconduct. The cause was referred to a Special Master in Chancery to take and report the evidence and state the account. The Master took the evidence and filed a report and later supplemental reports. Counsel for the respective parties agreed upon many of the items which were objected to in the original and supplemental reports of the Master, and agreed to submit the evidence to the Chancellor on the question of fraud and obtain a ruling on the question, and as a result of that agreement a hearing was had with the result that the Chancellor made a written finding that the fraud charged in the bill was established by a preponderance of the evidence.

After this written finding was filed, counsel for the

respective parties agreed as to all the items in dispute except three, and entered into a written stipulation to that effect. and that the stipulation should stand as final objections to the Master's report, and as exceptions there-

to on the final hearing.

On final hearing the Court made a second interlocutory finding in writing and filed the same, overruling the exceptions to the Master's Report as to said three disputed items, as a guide to counsel in the preparation of the final decree and final decree was prepared and entered, accordingly from which decree this appeal was taken.

The claim of appellee Rose was disposed of by stipulation of the parties. It is contended by appellant that the evidence does not show that appellant was guilty of fraud and misrepresentation. The evidence shows that during the negotiations which led up to the signing of the agreement between appellant and appellee Douthit, appellant exhibited to Douthit a paper purporting to be an inventory of the assets of the business, the footing of which was $28,714.65, and representated that this inventory represented the value of the assets and sold the one-half interest to Douthit for $14,357.00 which sum the Master found, upon evidence fully supporting his findings, was $5,810, in excess of its value. ~~sum of $5,810, which was one of the three items in dis-~~

Upon this state of facts the court was fully justified in finding that appellee Douthit had been induced by fraud and misrepresentation to enter into the contract and to order Douthit credited in the accounting with the sum of $3,810 which was one of the three items in dispute. ~~sum of 5,810 which was one of the three items in dis-~~

During the operation of the partnership a note was given by the firm to appellant for the sum of $3,636.28, upon the back of which note there appeared credits through which a pen had been run by appellant and the court allowed these credits as of the sum of $734.00.

Appellant claimed credit for $815, for money received

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by the firm in payment of a note which appellant claimed belonged to him individually. It appears from the evidence that this note was listed in the inventory shown to Douthit during the negotiations preliminary to the agreement and the credit was therefore properly denied appellant.

The abstract in this case is a confused mass and we have been obliged to go to the record itself in several

instances and from this we find that by reason by missing invoices, missing leaves from account books, failure to keep true and correct books of account and to enter all the firms transactions thereon, and appellant's confessed failure to make an effort to keep a correct account of the cash sales or of merchandise purchased, it was a matter of great difficulty for the special Master to state an account and by reason of these facts and the additional fact, that appellees in their brief truly say, "Not merely appellant's abstract but also the additional abstract of appellee, both are incoherent," we are of the opinion that it would be absolutely impossible for any court or Master to state an account between these parties which would be correct to the dollar.

From a careful examination of the voluminous record, we are of the opinion that the appellant was not over charged in the statements of the account by the special master and that the decree of the Circuit Court is fully justified by the evidence.

The decree of the Circuit Court is affirmed.

General No. 7549 Agenda No. 50

October Term, A. D. 1922

Sam W. Sincere, Appellee,

vs.

Springfield Produce Co., Appellant.

Appeal from Sangamon

HEARD, J.

This is an appeal from a judgment for $846.45 and costs in a suit brought by appellee against appellant for damages for appellant's failure to accept and receive 525 barrels of apples which appellee claimed to have sold to appellant.

While appellant claims that the contract was simply one of brokerage and not of sale, the letters written by appellant's manager to appellee clearly indicate that the contract was one of purchase and sale. The main question for determination is whether appellee prior to the making of the contract represented to appellant that the 525 barrels of apples which were in cold storage at St. Louis, Mo. were to be No. 1 or grade A apples or as contended by appellee that only 190 barrels were to be No. 1 or Grade A, and the remaining 325 barrels were to be "Commercial Pack" or "Orchard Run" apples—as they proved to be when inspected. Upon this question there is a direct conflict in the testimony of the contracting parties. There is also a conflict in the evidence as to the condition of the apples at the time they were inspected and acceptance refused by appellant. Appellant's Manager and a Mr. Miller went to St. Louis to inspect the apples. The Manager testified that inspection disclosed that 190 barrels were number one A grade apples, while the remainder of the apples were number threes, but not first class number threes; that the remainder showed from a half barrel to three pecks decay to the barrel and consisted of odd sizes, small and large, culls and ciders, that should not have been put in the barrel; that the 190 barrels of apples were in fair conditions; that there were possibly 8 or 10 bad apples in each barrel; that he was satisfied with said 190 barrels so far as quality and condition were concerned. On the other hand it was stipulated that Miller if present would testify that the in-

spection disclosed one hundred ninety barrels of No. 1 a-grade apples and the remainder of the property consisted of commercial pack or orchard run apples. The controverted questions of fact were

for the jury to decide and the language of the Supreme Court in Marble v Marble 304, Ill. 229 is particularly appropriate in this case. They there say "The condition of the record is such that an appellate court would not be justified in setting aside the finding of the trial court on the ground that it is contrary to the evidence. To do so the appellate court must find that the finding is manifestly against the weight of the evidence, after taking into consideration the better opportunity of the trial court to determine the question by reason of its opportunity to see and hear the witnesses. There was ample evidence to sustain a finding either way when only the evidence on one side is considered, and when all the evidence is considered it is too evenly balanced to enable the court to say that a finding either way is manifestly against its weight."

Some question is raised as to the rulings of tne court in the admission and rejection of evidence and the giving of instructions but we find no reversible error in any of such rulings.

It is contended by appellant that the damages are excessive. Sec. 67 Chap. 121-a Cahill's 1921 Rev. Stats. Ill., provides that where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non acceptance in which case the measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events, from the buyers breach of the contract. When there is an available market for the goods in question, the measure of damages is, in the absence of special circumstances, showing proximate damage of a greater amount, the difference between the contract price and the market or current price at the time when the goods ought to have been accepteo, or, if no time was fiixed for acceptance, then at the time of refusal to accept. The damages allowed by the jury were within the scope of the evidence when measured by the rule thus laid down.

The judgment is affirmed.

General No. 7379 Agenda No. 65

October Term, A. D. 1921

Cora Williams, Appellee

vs.

Louis Manning, Appellant

Appeal from the Circuit Court of Shelby County.

SHURTLEFF, J.

This cause was submitted to this court at the October Term, A. D. 1921. After the same was submitted one of the justices of this court, having become incapacitated, the case was heard by the two sitting justices, and they not being able to agree, the judgment of the lower court was affirmed, by law. Later, and within the proper time, a petition for a re-hearing was filed and presented to this court and the same was heard by the full court.

Appellee brought this suit to recover damages for injuries sustained by a collision with appellant's automobile. The accident occurred on the south side of the public square in Shelbyville, on the morning of December 2, 1919. On that morning appellee was on her way to the laundry, located on the south side of the public square, and had with her a package that she was taking to the laundry for her employer. The morning was clear and cold. The thermometer was about zero and a strong wind was blowing from the north.

The public square is a plat of ground immediately south of the Court House. Between the square and the Court House, running

east and west, is Main street. In the center of the square is a monument. There is a public street on all four sides of the square and Washington street is paved and 30 feet inside, from curb to curb and intersects the public square from the south at about its center. The square was paved and at the time of this accident there was no snow on the ground. The time was about 9:30 in the morning. On the south side of the square, where Washington street intersects it, and on the west side of Washington street at the corner, is the store described as the "Kessel Store." Immediately east of this store and across Washington street and on the corner is the feed store referred to in the evidence. Farther

east and at the southeast corner of the square and on the south side is the laundry to which appellee was going. On the east side of the square and at the southeast corner of the square turned east, around the turn, to a point mony. Both Washington street and Main street through the business district of the city were paved.

The defendant, Manning, was a farmer living about two miles east of Shelbyville and on the morning in question he was riding on the front seat of his Maxwell automobile with his employee, an experienced driver, who had charge of the motor vehicle. They came to town from the east and on reaching the public square, came west on Main street, past the Court House to the west side of the square, where they turned south along the west side of the square and then at the southwest corner of thes quare turned east, around the turn, to a point where they would turn into Washington street. As the automobile turned east along the south side of the square and while some 25 or 30 feet from appellee, who had stepped off into Washington street going east, the horn of the atuomobile was sounded and the brakes immediately applied. It was shown that

appellant, after turning east at the southwest corner of the square, reached Washington street, saw appellee when 50 or 60 feet from her and that the appellee was then within a few feet of the curb. The appellee had left the Kessel store and crossed the sidewalk and started to cross the street eastwardly across Washington street. From the time appellant first saw appellee until the accident actually happened, he had a plain view of the plaintiff all of the time and it was shown that during all of this time and until appellant caused the horn to be sounded when distant 30 feet from the appellee that the plantiff did not see the automobile. She was walking with her hand with something in it, up at the side of her face, apparently to protect her face from the wind and weather.

After the defendant first saw the plaintiff, the car was driven about 30 feet when appellant told the driver of the automobile to blow the horn. When the horn was sounded, it seemed to bewilder the plaintiff. At that time the car was moving in a southeasterly direction to

make the turn into Washington street from the south side of the square. While the horn was being sounded the car turned around the corner south and undertook to go between appellee and the westerly curb of Washington street. The appellant knew when the car turned south that it would be close. The appellee, according to the testimony of appellant, after he first saw her, left the sidewalk and had walked out into the street some 10 or 12 feet, before appellant told the driver to blow the horn. The car in question was going, in accordance with the testimony of some of the witnesses, from 12 to 15 miles per hour, and according to appellant's witnesses at a lesser speed, some of them placing it as low as five and six miles per hour. When the horn was sounded appellee looked first to the south and then to the north, the

direction from which the car was coming, and, according to the testimony of some of the witnesses she jumped and was struck while she was in the air. The brakes of the car were on, at the time it struck appellee, and the car was slowing down. Appellant's car ran over the appellee with the right front wheel and later the left wheel ran over her, the car stopping very shortly after it had run over appellee.

There was a trial by jury, in the lower court, a verdict of a thousand dollars for the plantiff, a motion for a new trial, which was overruled, judgment on the verdict and defendant appeals.

Appellant contends in this court, and it is the main assginment of error, that appellee at the time of the accident, was not in the exercise of due care and caution on her own behalf. Appellee testified that she didn't see anything of any automobile before she stepped off the sidewalk. She says: "I was looking in every direction but didn't see any or hear any. After I had gone a very few feet off the siedwalk, I saw the car right in front of me: it blew, was the reason I saw it. When I looked up, he blew the horn right in my face; I had to look it was so close to me, I had no chance to step one way or the other. It was right on me. The automobile passed over me. One wheel went across my chest and one across my abdomen."

Dr. Johnson, a witness in behalf of appellee, testi-

fied: "She was protecting herself from the cold, as it was a bitter cold morning, and I thought she had something up over her head and it seemed to me that that was the reason why she didn't hear the car. She was protecting her head. She may have had a broad brimmed hat or something extra above her.

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On cross-examination Dr. Johnson testified: "She first looked south and then north and then hesitated. She was then something like eight feet east of the sidewalk on the west side of Washington street. After she looked to the south and north and hesitated, she backed up two or three feet. She moved her entire body back in a stooping position and turned her head looking directly at the car. She didn't turn her body toward the car. She had her arm up in a position to enable her to protect her head from the cold; she was going east and the car was crossing from the northwest behind her and when the car struck her the car was practically in a north and south position going south. She was bending her head toward the north, had her arm up about her head. The car was going slow. There was space enough west of Miss Williams between her and the curb of the sidewalk that would have allowed the car to pass between her and the curb before she started back. If at the time she stopped and before she backed up, she had remained still, the car would have passed her to the west and by at least a good foot. If she had stood still she would have been all right."

On behalf of the defendant, appellant, John Stewardson testified: "At the time the horn of the automobile sounded Miss Williams was from 12 to 15 feet from the west curb of Washington street going east across the street. The right front wheel of the car passed over her. At the time the horn sounded she was going east. She turned and looked northwest back of her, stepped on forward and then came back. She was between 12 and 15 feet from the west curb of the street when the car went over her. The car was aiming to get in behind her and the hind wheel of the car went over her body about her shoulders."

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Pearly Dewees, the driver of the car, on behalf of

appellant, testified as follows: "We came to town from the east coming in past the Court House passing around the west side of the public square and turning east driving about seven or eight miles an hour. As I turned the car around the west side of the square toward the east I saw a woman. She was just stepping off of the walk going east from Kessel's store. She was then 30 or 40 feet away from me. I then honked the horn. It was then working in good order. The horn made such a noise that she ought to have been able to have heard it. When I honked the horn she took a step, looked to the south, then turned and looked north and as she turned and looked north she started back to the west. When I honked the horn I put on the brakes. This was about ten feet away from the plaintiff. The car slowed down until I was going four miles an hour. The plaintiff was about four feet from the west curb of the street when the car struck her. She had been further out in the street something like 12 or 15 feet. I was intending to drive the car south on Washington street. I tried to miss her and pulled the car to the southwest. If she had stayed at the point in the street that she was when she stopped, I would have missed her at least three feet going to the west side. I think she turned to the south and ran back right in front of the car. The right front fender struck her. The car was going a little bit southwest. Within five feet I stopped the car after I struck her. The brake was on. She came back six feet. When I honked the horn I also put on the foot brake and this shuts off the power of the car. I did shut off the power of the car by pushing in the clutch with the other foot. This was done when I saw her start back. I was

then 20 feet from her. The brake was working properly at this time. Mr. Manning told me to honk the horn. We were then not going faster than seven or eight miles an hour. The front wheels were turned southwest. If she hadn't run into the car I wouldn't have hit her. As she turned around and came back I was trying to dodge her and keep from hitting her."

John J. Baker, a witness on behalf of appellant, testified: "When she got probably 12 feet from the curb she was struck by a car that was coming from the west

side of the square. She was walking along against the wind, as it was a cold, windy morning. She was apparently protecting her face from the wind. I remember she looked north at the time I saw the car. The car was then I would judge 20 or 25 feet from her. She was then between 10 and 15 feet from the west curb of the street near the middle of the street. She started backward with the idea of crossing the street, then changed her mind, and turned around and started back to the west curb from which she had come. If the lady had stood still, at her farthest point out in the street, there was room for the car to go between her and the west curb."

The appellant testified: "It was a very cold, windy day. The wind was blowing from the north or northwest pretty strong. The radiator was frozen and I wanted to get to a garage to have it thawed out. We turned south of the west side of the square. I then noticed a lady. When I first saw her we were 50 or may be 75 feet away from her. I did not then notice who she was. She was walking along going east. She had some part of her wrap up over the side of her face with her head bent down toward the north. Whether it was a coat collar or a hat rim I couldn't tell, but there was something she was holding up over her head to the north. This was

being done by her left hand. I saw that she was going to cross the street going east from the Kessel store and I did not think she saw us or knew that there was a car near and I said to Dewees, 'blow your horn.' We were then some 25 or 30 feet away from her, when the horn of the car was honked. It seemed to scare or frighten her and she turned to the south and started back the way she was coming from. She ran west at first, made a few steps west, then a few steps rather meeting the car as we were going southeast and as soon as she turned toward the car, Dewees put on the brakes. I saw him sitting back in the seat and from his action he must have shoved the clutch out and the foot brake in. The car slowed down at that time. I procured the medical attendance of Dr. Johnson, Dr. Mizell, Dr. Bivens, Dr. Monroe and Dr. Thompson and settled

those bills myself."

The foregoing is substantially all of the evidence offered by either side, showing or tending to show due care on the part of appellee. Appellant in view of all of this evidence states, in his brief, that it may be further conceded that each party was honestly attempting to avoid the thing that did happen, and appellant by his brief further presents the proposition, that the "driver and operator of a motor vehicle, charged with the duties that the law imposes of right, can be required only to anticipate what an ordinarily reasonable and prudent person would do under given circumstances; and can not be charged with foreseeing what a thin, nervous, undernourished, excitable woman will do when in a place of danger."

Some of the principles of law as applicable to this case are that there is no imperative duty resting upon pedestrians in public

highways to keep a continuous lookout for automobiles under penalty, and if they fail to do so, and are injured, contributory negligence will be conclusively imputed to them.

"Cases involving the conduct of a person about to cross a railroad at a grade crossing are not in point. Railroad crossings are necessarily dangerous, but a public street crossing is not ordinarily a dangerous place and all persons entering thereon have a right to assume, that all persons about to use the same will exercise due care and caution to prevent injury to them." **Graham vs. Hagmann, 270 Ill. 252 (256-258).**

The fact that a person voluntarily takes some risk is not conclusive evidence under all the circumstances that he was not using due care; and, where a plaintiff is suddenly placed in a position of peril, without sufficient time to consider all the circumstances, the law does not require of him the same degree of care and caution as it requires of a person who has ample opportunity for the full exercise of his judgment and reasoning faculties. Especially is this so, where the peril has been caused by the fault of the defendant. It has been long settled that a party, having given another reasonable cause for alarm, cannot complain that the person so alarmed has

not exercised cool presence of mind, and thereby find protection from responsibility for damages resulting from the alarm." **I. C. R. R. Co. vs. Anderson, 184 Ill. 294-303.**

Where a person is involuntarily, through the fault or negligence of the defendant, placed in a situation of peril to life or limb, and by reason thereof is confronted with sudden danger, then the law does not require of him the same degree of care and caution it does of a person who has ample opportunity for the full exercise of his judgment and reasoning faculties."

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Dunham T. & W. Co. vs. Dandelin, 143 Ill. 410; Wesley City Coal Co. vs. Healer, 84 Ill. 126.

"The driver of a motor wagon is under duty to keep his motor power under such control that he will not run into one crossing the street with ordinary care." **Hartwig vs. Knapwurst et al., 178 Ill. App. 409.**

"One confronted by sudden danger from a rapidly moving automobile is not guilty of contributory negligence because, in an effort to get out of the way, he acts contrary to what was expected of him by the driver."

"The fact that plaintiff could have avoided injury by stepping in another direction or by having continued in his original course did not render him guilty of contributory negligence." **Kuchler vs. Stafford 185 Ill. App. 199.**

The degree of care and caution to be exercised by the drivers of vehicles depends upon the character of the vehicle used and the more dangerous the vehicle and the greater its liability to do injury to others, the higher is the degree of care and caution to be exercised by the person charged with the duty of its operation." **Graham vs. Hagmann, 270 Ill. 252.**

"Automobiles have no greater right in the street than other vehicles and pedestrians and automobile drivers have equal rights in the use of the streets, and it is the duty of the driver to have his automobile under control and if necessary to stop altogether." **Kerchner vs. Davis, 183 Ill. App. p. 600.**

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From the testimony recited and from the law as laid down by our courts, it is very evident that appellee,

plaintiff below, offered some evidence of due care and caution upon her part for her own safety. In determined to have constituted due care and caution in the matcular acts and things the appellee should have performed to have constituted due care and cautioni the matter of the weather and the wind and the fact that plaintiff, if she was such, was a thin, nervous, undernourished, excitable woman, should be taken into consideration, and are all questions to be considered in the determination of that question, all of which and the evidence submitted, was a question for the jury to pass upon, and the jury having seen the witnesses and heard the testimony and determined that question by their verdict, it is not for this court to specifically weigh the preponderance of the evidence and to say, in a case where there was evidence such as was submitted in this case, that the jury have not weighed the same correctly. The verdict is not against the manifest preponderance of the evidence and should not be set aside by this court.

Complaint is made and much evidence submitted, tending to show that the appellee was afflicted with trauma neurosis and that after her injury she was easily subject to suggestion and possibly by intendment, exaggerated her injuries and did not take proper measures to secure her own relief. With that phase of the case this court is much impressed. There were no bones broken. There was a serious shock and some contusions and the appellee for a considerable length of time was unable to work. The jury found a verdict in favor of the plaintiff in the sum of $1,000. It is not a large verdict, and this court is impressed with the idea that the jury took into consideration, in fixing the amount

of the verdict, many of the matters that are called to the attention of this court.

Seeing no error in the record that would warrant a reversal, the judgment of the lower court is affirmed.

Heard J. Decents.

General No. 7492 Agenda No. 9

October Term, A. D. 1922

Bruning Lumber Company, Inc., Defendant in Error

vs.

John Magnuson, Plaintiff in Error

Appeal from Mason County.

SHURTLEFF, J.

John Magnuson, plaintiff in error, for many years last past has been a resident in the city of Peoria. He owns a tract of land in Mason County, to improve which by the erection of certain buildings thereon he bought material of the Bruning Lumber Company, Incorporated defendant in error herein, which property then was and now is covered by a mortgage in favor of D. F. Lawley, the other defendant herein, who now is and for many years last past has been a resident of Tazewell County.

The Bruning Lumber Company on February 8, 1922, brought suit in chancery in the Mason County Circuit Court to foreclose a mechanic's lien to recover the value of such lumber. The bill prayed for three summonses, one to be directed to the sheriff of Mason County, for service upon defendant Magnuson; one to be directed to the sheriff of Peoria County for service upon Magnuson, and one to the sheriff of Tazewell County for service upon defendant Lawley. The writ directed to the Peoria County sheriff was duly served by him upon Magnuson in Peoria County, but the Mason County sheriff returned his "not found" while the Tazewell County sheriff

procured service in Tazewell County upon Mr. Lawley. Neither of the defendants was served with process in Mason County and neither of them entered his appearance in said cause. Defendant Magnuson pleaded in abatement so as to question the jurisdiction of the Mason County Circuit Court, as to his person and of the subject matter, and as to which plea complainant made an oral motion to strike same from the files, which motion was overruled by the court and which plea was then set down for hearing but after amendment the court overruled the same and then entered a rule upon both of the defendants to plead within a given time, and failing in which both defendants were defaulted.

On February 16, 1922, the court referred said cause to the Master, ordering him to take the proof in the case and to report same with his conclusion thereon, but two days before that time, on February 14, 1922, the Master made his report in said cause finding the facts for complainant and recommending a foreclosure, and on February 17, 1922, the court approved the Master's report made as above set out. The record shows that the witness who was examined by the Master made oath on February 14, 1922, that the testimony so given by him at that time before the Master was true. The Master reported a certain amount was due complainant from Magnuson for lumber in which was included also the further sum of $75.00 for complainant's attorneys or solicitors fees with interest computed on the whole sum from the day of the last delivery of said lumber.

Plaintiff in error insists that the main legal question presented by this record is whether the Mason County Circuit Court acquired jurisdiction of either of the defendants to adjudicate this cause. Plaintiff in error argues the further question as

to whether the court, assuming that it had jurisdiction of the persons of the defendants, should have allowed, as it did, an attorney's or solicitor's fee of $75.00 in this cause, and, if so, whether the allowance should be made direct to counsel or to complainant; and, third, whether the complainant having failed to prove that he gave the notice required by statute to sustain a lien, the court had jurisdiction to find for the complainant.

Plaintiff in error insists that there was no legitimate proof offered by the complainant in support of his claim and the assignments of error embrace nothing but these questions of law. They are argued by plaintiff in eror. Plaintiff in error argues that Section 3 of our Chancery Act provides: "Suits in chancery shall be commenced in the county where the defendants or some one or more of them reside; or, if the defendants are all non-residents then in any county, or, if the suit may affect real estate, in the county where the same or some part thereof is situated."

Counsel for plaintiff in error has presented various

authorities holding that the foreclosure of a mortgage is not such a suit as affects the title of real estate, and that real estate titles are not involved in such decrees and that the appeal in view of that fact is to the Appellate Court and not to the Supreme Court.

Without going into an examination or elucidation of all the cases cited by counsel growing out of or having a bearing upon the construction of Section 3 of the Chancery Act, is is sufficient to say that Section 9 of Mechanic's Lien Act, as passed in 1903, provides: "If payment shall not be made to the contractor having a lien by virtue of this act of any amount due when the same becomes due, then such contractor may bring suit to enforce his lien by bill or petition in any court of competent chancery jurisdiction

in the county where the improvement is located," and that prior to the enactment of this statute it was the ancient rule of equity, as declared by the courts of this state, that a suit in equity to foreclose a lien was properly brought in the county where the land lay. **Bevens vs. Murray, 251 Ill. 603; Enos vs. Hunter, 9 Ill. 211.**

Counsel for plaintiff in error complains because the Master recommended, and the court by its decree found, an attorney's or solicitor's fee in favor of complainant's solicitors to the amount of $75.00, quoting **Manowsky vs. Stephen 233 Ill. p. 409;** and it is conceded to be the law that the provision in the Mechanic's lien act for the allowance of solicitor's fees is unconstitutional and if plaintiff in error had entered his appearance in the cause and filed proper objections to the Master's report and to the decree, without doubt that error would have been corrected in the lower court.

In **Hass Electric Company vs. Amusement Company, 236 Ill. 466,** which was a suit to foreclose a Mechanic's Lien, the lower court allowed a solicitor's fee under the statute. On page 466 the court held: "Upon evidence heard an attorney fee of $125.00 was allowed the lumber company's solicitors. Since this case was heard in the Appellate Court, this court, in the case of Manowsky vs. Stephan, 233 Ill. 409, has held that portion of the Mechanic's Lien act allowing attorney fees for lienor's

solicitors unconstitutional. No objection or exception to the allowance of attorney fees was made before the Master or in the court below, nor was the constitutional question raised until the case reached this court. We are of the opinion that appellants have waived their right to raise this question by failing to raise it in the court below, and if it had been so raised it would have been waived

by taking the case to the Appellate Court instead of bringing it directly to this court." i

Plaintiff in error complains because the evidence was taken before the Master in Chancery before the order of reference was entered in the Circuit Court, but plaintiff in error, being in default in the lower court, does not seem to be in a position to raise that question in this court. **Hurd vs. Goodrich, 59 Ill. 450; Whittemore vs. Fisher, 132 Ill. 243; Moore vs. Titman, 33 Ill. 358.** The court said in the last case on page 366: "It is true the parties being in court they have the right in a case where the bill is taken as confessed, to appear before the Master at a reference, if they think proper. But in such a case the practice does not require notice or upon the Master making his report of his computation the defendant may, if he choose, file exceptions and resist its approval."

"The reason of the ruling requiring exceptions in the court below is to give the opposite party the proper opportunity to avoid, by argument, or by supplying any defect in his proof, the effect of the objection. **3 Corpus Juris 692."**

It is the opinion of this court that the defendants being in default, the court had the right to enter a decree upon the bill as filed, or to refer the same, and no objections having been taken to the Master's report or exceptions filed before the court, the defendants are not in a position to raise those questions for the first time in this court.

Plaintiff in error also objects that interest was allowed to the complainant on his entire claim from the last day of delivery of said material in the absence of a contract to that effect. As to this objection, plaintiff in error is in the same position, being in default, that he is

in as to the other objections cited, and in addition thereto Section 1 of the Illinois Revised Statutes,

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Chapter 82 as to Liens, allows interest on the claim from the date the same is due.

Plaintiff in error makes another serious objection that in and by the decree the right of redemption was denied to the defendants, and states that the Master is ordered to sell the property after advertising the same for six months and make deed to the purchaser.

We have examined the decree as entered in the record in this case. We find that it was entered on the 17th day of March, 1922, and after various findings as to proceedings and amounts it finds that the complainant is entitled to a lien upon the premises as to the amount of the indebtedness. It is ordered that the complainant have a lien on the said premises for the amounts as set out and orders that the defendant John Magnuson pay to the complainant the sum of $433.87, with interest from the date of this decree within twenty days from this date, and that the Master in Chancery of this Court is directed at once to make and deliver to said complainant a certificate containing the names of the parties as set forth in this decree, the date thereof, and the amount found due, hereby including interest together with a description of the aforesaid real estate and costs accrued. Thereupon, at the cost of said complainant, said Master is directed to file in the office of the recorder of this county a duplicate of such certificate and that if the said sum found to be due to the complainant by this decree shall not be satisfied, according to the statute in such case made and provided, the said Master in Chancery, or his successor in office, shall make sale of said premises or such part or parts thereof as may become necessary to pay the amount aforesaid, at public vendue, to the highest and best bidder, for cash, and to carry into effect this decree; further providing as to publication and the other pro-

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visions of sale, and further orders that the Master will report his doings in the premises to this court.

We are not of the opinion that the decree as found deprives the defendant of his right of redemption.

The judgment of the lower court is affirmed.

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General No. 7509 Agenda No. 21

October Term, A. D. 1922

W. D. Cook, Appellant

vs.

Theodore Clark, Appellee

Appeal from the Circuit Court of Pike County.

SHURTLEFF, J.

The bill of complaint in this case is brought by appellant against appellee to obtain relief against both actual and permissive waste, and to compel appellee to put the premises in a reasonable state of repair so that by waste he, appellant, will not eventually lose the greater part of the value of the premises, appellee holding the property as homestead and dower and appellant owning the fee.

Many years ago appellee married Victoria Durnbeaugh. After their marriage Victoria Durnbeaugh Clark died, leaving her husband, Theodore Clark, and leaving four children by her former husband, named Durnbeaugh, and owing the real estate described in the bill of complaint. After the death of his wife Clark, appellee, filed his bill and procured by decree the setting off to him of a homestead, which is called in the evidence the "hotel property" and as dower the property known as the "garden patch." The "hotel property" is a piece of ground lying north of the Griggsville and Valley City road and west of the Chambersburg and Valley City road. In an early day a small house stood on it, which was used for saloon and store purposes; perhaps twenty-three years ago the M. E. Church in Griggsville, Illinois, was purchased and moved to

this lot and a two-story house with an "L" a story and a half high, and a dining room, kitchen and summer kitchen were built, by using the church, together with the house or store that was then there. The house is about 27 feet wide east and west and 40 feet deep north and south. It fronts south on the Griggsville and Valley City road. Approaching from the south, is first that part of the house which is two-stories high; it is about 16 feet deep (north and south) and contains a hall, communicating with the second story, and a parlor; immediately north is the "L", which is one and

a half stories; this contains a bedroom on the east and a sitting room on the west; under this part of the house and extending some little distance under the dining room is a cellar 18 by 20 feet. Immediately north of the "L" is the one-story structure which contains the dining room and kitchen, with a porch to the west and immediately north of this structure is the summer kitchen. The entire building has rock foundations, is built on beams, and through the cellar, east and west, extends a large beam, 12 by 14 inches, this beam being called in the evidence the "large beam" and "swinging beam." It divides the distance of the cellar equally and was so placed because the distance was too great to be spanned by the four sleepers or joises, which run north and south from the walls to the "swinging beam." This beam, carrying as it does the center of the house, is of the greatest importance. The roofs of the buildings are of various materials. One side of the two-story building is roofed with steel barn roofing, the other with shingles. These roofs have been in use for many years. Entrance to the cellar was formerly had by means of an outside entrance on the east side of the building; half of the cellar door is now gone and some of the rock foundation formerly around the entrance, it is claimed,

has fallen away, allowing the destructive force of the elements full sway.

At the time appellee first took possession of the premises and at the time appellant was negotiating for the purchase of the fee in the premises, there was in addition to the large house described on the hotel property a barn and ice house, both claimed as substantial improvements and of great value to the premises. While appellant was negotiating for the purchase of the fee, the barn was burned, while uninsured, and the appellee tore down the ice house, piling the material of which it was constructed on the premises. The ice house was claimed to be a substantial building, constructed with rock walls a foot thick, having lumber roof. After the appellant, Cook, had secured and recorded his deed for the premises, the appellee sold the material of which the ice house had been constructed for $50.00 and permitted it to be removed from the premises, in which he had

only an estate of homestead and appellant owned the fee.

The "garden patch" at the time it was set off as dower was unimproved except by a picket fence now long since permitted to decay and fall down and is now practically unfenced. It lies east of the Chambersburg and Valley City road and north of the "hotel property" and is used as a garden and truck patch.

In the year 1907 the Durnbeaugh children, by their guardian, filed their bill charging Theodore Clark, the appellee, with both actual and permissive waste as to all the premises, particularly charging that he had permitted the roofs to become old and worthless, the sides of the "hotel property" to waste away until the house was damaged by rain and water; the "large beam" or "swinging beam" to become decayed and broken, until it did not properly support the house, and the fences around the "garden patch" to waste

and fall down. The cause proceeded to decree and the Pike County Circuit Court found that Clark was guilty of everything with which he was charged; ordered him to repair the siding of the building so that it would not be injured by rain and water; to repair the "swinging beam" or "large beam" so that it would properly support the house; repair the roofs and to replace the fence around the "garden patch" in as good condition as when he took over the premises. The "swinging beam" or "large beam" broke of its own weight about twenty years ago and at that time it was supported by five posts placed under it. When the Durnbeaugh case was tried it was claimed that the stability of the building was threatened by Clark's neglect of this beam.

Appellant Cook, secured title to the reversion of these premises by Quit Claim deed, dated May 15, 1920, recorded on June 24, 1920, and this suit was brought to the November Term, 1920, of the Pike County Circuit Court. Appellee answered the bill and the testimony of witnesses was taken before the Chancellor, who heard all the evidence and there was a decree in favor of appellee dismissing the bill for want of equity and appellant has assigned error and brought the cause to this court by ap-

peal.

Appellant especially complains of the ruling of the lower court and the decree by reason of the "swinging" or "large beam" and yet we find from an examination of the evidence that this beam has been in substantially the same condition that it is now in, for at least twenty-five years. Wallace Goldman purchased this property about twenty-five years ago and moved into it. He found this "swinging beam" supported by props or posts and he inspected this beam not long before he testified in the case and said that

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it was in the same condition as when he purchased the place and during the time that he lived there.

The appellant, Cook, lived in this house four years prior to 1907 and testified that the beam was supported by these props at that time, and he further testified that he had not been inside of the cellar for fourteen or infteen years and he was not able to state exactly how many props supported the beam at the time he lived in the house.

From this and other evidence in the record we are satisfied that the "large or "swinging beam" is in substantially the same condition it was in twenty years ago.

The appellant complains of the finding as to the roofs and yet the testimony shows that the roof on the east side of the main building has been constructed new with a galvanized roofing, and that the roofs on the west side of the main building and on the rear of the building are shingled. There is some testimony of witnesses stating that these roofs do not look very good, but there is other ample testimony that these roofs do not leak and it can not be said as a matter of law that a roof which does not leak, even though it may not look very good, is the result of waste.

Complant is further made that some of the foundation on the east side of the house and near the cellar entrance had fallen in. It appears from an examination of the evidence that the main part of the stone foundation is laid up in mortar or cement, but that the foundation under the story and a half building is constructed from rocks laid one upon the other, without mortar or cement,

and that about three feet of this wall in length and about a foot in depth became loose and fell out and that the appellee replaced it or, using the exact language of appellant in his testimony,—

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"There are a lot of rocks fallen out of the east side and north of the cellarway. Clark put the rocks back with his hands."

Complaint is made that the fence which formerly was around the garden has become decayed and was out of use. This lot is 80 by 160 feet. There is a street on the west side and an alley on the south and the Wade property is on the east and the Clark property on the north with the duty devolving upon the owners of the Wade and Clark properties to maintain one-half of the division fence. The testimony shows that there is a new wire fence along the street; that the only purpose for a fence around this lot is to keep out chickens when the lot is used for garden purposes, and with the exception of two witnesses the testimony all shows that there is a wire fence around this lot sufficient to turn chickens. We gather from the testimony that portions of this lot during seasons of the year are covered by overflow water and that the entire subject of fence does not involve a matter in excess of $15.00. We are not of the opinion that the conditions surrounding this matter of fence of the small garden are sufficient upon which to base the bill in this case.

It would appear that the appellee during his occupancy of the premises had removed all of the old twelve-light windows in the house and replaced them with windows containing four lights each. Concrete walks have been built in front of the house and along the side and the rear porch. The lawn has been seeded to blue grass and appellee has set out and grown five shade trees. The house is painted and presents a nice appearance. Appellee put on a metal roof on the east side of the house and witnesses state that the house stands "plumb." Altogether, several of the witnesses, including appellant, testify that the place has a nice,

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neat appearance and looks as well, at the present time, as it ever has since it was built.

Complaint is made in regard to the burning of the barn and that appellee suffered the same to be destroyed while it was not insured. It is not the duty of the life tenant to provide insurance for the benefit of the remaindermen.

"The law does not impose on a widow having an estate of homestead the duty and obligation of preserving the buildings involved, by insurance against fire, and of applying money received from such insurance to the rebuilding thereof, in case of destruction by fire, so that the heir shall not be deprived of the inheritance. **Home Ins. Co. vs. Field, 42 Ill. App. 392."**

"A homestead, under the present law, is an estate in land. It is a freehold. In Hammer vs. Johnson, 44 Ill. 192, it was held that the owner of an undivided interest in property, who procures insurance to protect his own interest cannot be compelled to account to his cotenant in case of loss by fire. In Harrison vs. Pepper, 166 Mass. 288 (33 L. R. A. 239) it was held that a life tenant is not required to use the proceeds of insurance obtained by him on a total loss of the building insured in his own interest for their full value, in re-building on the premises, and cannot be held accountable to the remaindermen for such money even if it amounts to more than the value of the life tenant's interest. **Ketcham vs. Ketcham 269 Ill. 584, 590."**

"In the absence of anything that requires it in the instrument creating the estate, or of any agreement to that effect on the part of the life tenant, we think that the life tenant is not bound to keep the premises insured for the benefit of the remainderman. Each can insure his own interest, but in the absence of any stipu-

lation or agreement, neither has any claim upon the proceeds of the other's policy, any more than in the case of mortgagor and mortgagee, or lessor and lessee, or vendor and vendee." **Harrison vs. Pepper, 166 Mass. 288. 33 L. R. A. 240."**

"The tenant for life is answerable if the houses or other buildings on the premises are destroyed by fire from the negligence or carelessness of himself or his servants; and he must rebuild within a convenient time at

his own expense. The life tenant is not liable, however, if the fire is the result of an accident, and he and his servants are free from fault." **Kerr on Real Property.**

Mr. Washburn, in his work on Real Property, states the law to be that if the fire occurs without the fault of the tenant, he would not be responsible. Such seems to be the well settled, if not, indeed, the unquestioned law in this country as to permissive waste.

"There is no authority or position that the accidental destruction of premises amounts to permissive waste, or to a tort, on the part of a tenant." **44 L. R. A. 714; Washburn on Real Property, p. 150.**

"A tenant for life is not liable for permissive waste which is the result of an accident without any fault on the part of himself or his servants. Whatever the legal liability, it is well settled that a life tenant is not liable in equity for permissive waste." **40 Cyc. 517.**

Some complaint is made about a small pile of stone taken down from the ice house which were piled up and on the lot at the time appellant purchased the reversion of these premises, and which

were later sold by appellee for $50.00. If this constituted an act of waste, it was waste committed before appellant secured any title to these premises and the rule seems to be that no person can maintain the action of waste unless he has an estate of inheritance in him, at the time when the waste is committed. **40 Cyc. p. 528 and note p. 529.** "For example, the heir can not maintain the action for waste done in the time of his ancestor; nor the grantee of a reversion for waste committed before the grant to him. **Robinson vs. Wheeler, 25 N. Y. 252."**

In a proceeding of this character it is indispensable that the parties shall allege and prove a clear and legal or equitable right, and a well grounded apprehension of immediate injury to that right. If, upon the allegations or proofs there shall be a reasonable doubt in either respect, an injunction will be denied. **Wilson vs. Bondurant 142 Ill. 645; Ribordy vs. Murray, 177 Ill. 134 139; Thornton vs. Roll, 118 Ill. 350.**

We have examined with great care this entire record and from a reading of all the testimony we are not

able to say that the finding of the Chancellor is against the weight of preponderance of the evidence, or that it does otherwise than actually follow the great preponderance of the evidence in this record. In addition to that, the Chancellor saw and heard all of the witnesses testifying, and we are satisfied with the conclusion that he has reached in this case.

The decree of the Circuit Court is affirmed.

General No. 7428. Agenda No. 1.

Edward Kelly, Appellant.

vs.

Thomas Morgan, Appellee.

Appeal from Hancock.

NIEHAUS, P. J.

In this case Edward Kelly the appellant, sued the appellee, Thomas Morgan in assumpsit, in the circuit court of Hancock county, to recover the price of a boiler, two radiators, a guage, certain pipes and fittings, and other materials which were purchased by the appellee; also for labor furnished, in the installation of a hot water heating plant in the barber shop of appellee at Stronghurst, Illinois. The declaration consists of the common counts, to which a bill of particulars was afterwards added. The bill of particulars specifies the articles embraced in appellant's claim; also the items of labor furnished. The sum total of the claim as itemized in the bill of particulars in $321.65. To the declaration filed, the appellee pleaded the general issue, upon which issue was joined. The trial of the case resulted in a verdict in favor of the appellee. The appellant made a motion for a new trial, which was overruled; and thereupon a judgment in bar was rendered against him; and from this judgment an appeal is now prosecuted. It was a controverted question on the trial, whether the appellant made a contract of warranty in connection with the sale of the articles to the effect that when they were put together and installed as a heating plant in appellee's shop according to a certain plan or outline alleged to have been drawn by the appellant, that the heating plant thus installed would heat the shop at 20 degrees below zero. The appellee testified in reference to the alleged warranty that he went to Carthage, to the place of business of the appellant and made a contract for the purchase of the boiler and radiators and material for the heating plant in question; and that he looked

over the materials which the appellant wanted to sell him for that purpose; and finally, that the appellant said: "Now there is the stuff;' but "I said I would have to have more stuff than

that; and he said, he had fittings and pipe at Vaughan's, and I could go over there and get what fittings and pipes I needed to complete the job. I said I would like to know about what it is going to cost me, and he said it was hard to judge, but he would draw a kind of an outline of the front of my shop, and see what it would take. He started and drew a plan. He and Mr. Mudd and I went there together, and he showed, where to place the radiators, where to place the pipes, and where to put the little heater so it would furnish as much heat as required. He said those radiators would be all that we would need to heat the building, that they would heat at 20 degrees below zero. * * * I said I wanted to know sure what the cost was before I ordered. * * * and that the plant must be guaranteed. * * * * Mr. Kelly said, he would ship the plant to Buck Babbington at Stronghurst, and all he asked me to pay was the drayage from the depot to the barber shop. I said I would do it, but I wanted it understood before I left, that the plant had to be guaranteed to heat the building, if not, I should not pay for it. He said, if it did not heat, he would take it out as free as he put it in. I said that looked fair enough." The evidence shows that the boiler, radiators and the other materials purchased by the appellee were shipped to Stronghurst by the appellant; and were there installed by the appellee, who employed Mr. Mudd for that purpose, and with the assistance of a plumber by the name of Babbington, whom the appellant furnished; and who was in the appellant's employ, and had been working on another job at Stronghurst. This was in January 1921. After the plant was put in, it was discovered that the boiler had cracked, and was leaking; the appellant thereupon secured a new boiler, which was shipped to the appellee, and was installed in the place of the defective one within two weeks. The appellant denied, that he had told the appellee, that

the plant when installed, would heat his shop at 20 degrees below zero; also denied, that he drew any plans or outline for putting the plant into the shop. There was a conflict of evidence between the parties also, concerning the price, which the appellee was to pay for the materials purchased. The evidence shows, that after the

new boiler had been substituted, the heating plant was tried out; and appellee contends, that the plant would not sufficiently heat his shop. It was sufficient however, to heat the water for the lavatories, which were used in connection with the business of the barber shop. He testified, that he continued to tryout the plant, but got no satisfactory result so far as heating the shop was concerned. That he thereupon told the appellant to take the plant out; that the appellant refused to do so; but insisted upon payment of his bill. The appellant denies, that the appellee told him to take out the plant. He also denies, that he made the warranty testified to, by the appellee at the time of the sale of the materials referred to. The appellant and the appellee were both corroborated, as well as contradicted by other witnesses in the case. It was therefore a fair question for the jury to determine which one gave them the correct version of the contract of sale; and which one testified to the truth concerning the controverted matters. It appears from tne evidence, and it is admitted by the appellee, that after he told the appellant to remove the plant from his shop, he continued in the use of the plant for about three months; and thereafter also continued to use the plant for heating the water for the lavatories in the shop which he used in his business. We are of opinion, that, by this use he waived his right to reject it; and that this use amounted to a legal acceptance of it. Wolf Co. v. Monarch Ref. Co. 252 Ill. 491; Underwood v. Wolf 131 Ill. 425; Prairie Farmer Co. v. Taylor 69 Ill. 440. It is contended by the appellee, that the use of the plant in the way indicated, should not be considered an acceptance thereof, because it was necessary for appellee to use

the plant to heat the water for the lavatories, because the lavatories had been connected up with the plant; and the use of the lavatories was necessary for the conduct of appellee's business. The fact, that the use of the plant was only partial; or that this partial use was necessary for carrying on appellee's business, and that a loss would have resulted to his business if he had not done so, does not do away with the legal effect of appellee's use of the plant, or the presumption of its acceptance by such use; nor does the fact, if it be a fact, that the ap-

pellant had agreed to take it out in case it did not fulfill the alleged warranty, make any difference, on this feature of the controversy. Wolf Co. v. Monarch Ref. Co. supra. Inasmuch, as the appellee must be considered as having accepted the materials and articles of merchandise sold to him, the appellant had the right to recover the purchase price of the same; but upon proof of the warranty, the appellee had the right to recoup the amount which the appellant could show, he was entitled to recover in this way, by proof of any damage that the appellee had sustained by breach of the alleged warranty. In Chitty on Contracts (11th Ed.) this point is made clear: "Where therefore the vendor of a warranted article, whether it be a specific chattel or not, sues for the price or value it is competent to the purchaser, in all cases, to prove the breach of the warranty in reduction of damages; and the sum to be recovered for the price of the article will be reduced by so much as the article was diminished in value by non compliance with the warranty." Chitty on Contracts (11th Ed) 652. Underwood v. Wolf, supra. There is no proof in the record however, of damages sustained by an alleged breach of warranty. For the reasons stated, the verdict of the jury finding the issues in favor of appellee, and the judgment of the court in bar of the appellant's right to recover, were erroneous. The judgment is therefore reversed and the cause remanded.

Reversed and Remanded.

General No. 7487. Agenda No. 4.

October Term, A. D. 1922

Mary E. Brown, Defendant in Error

vs.

William A. Compton, Plaintiff in Error.

Error to McDonough.

NIEHAUS, P. J.

The defendant in error Mary E. Brown filed a bill in equity in the circuit court of McDonough county on April 23, 1920, against the plaintiff in error, William A. Compton, praying for an accounting, and other relief. The bill alleges, that Benjamin C. Morrow, father of defendant in error, died intestate on the 20th day of September, 1910, owning 170 86-100ths acres of land, which was of the value of not less than $225.00 per acre; that the deceased left a widow surviving him, who was 74 years of age; and eight children, as his heirs at law; that these eight children, of whom the defendant in error is one, by reason of the promises became seized of the land in question in fee as tenants in common, subject to the homestead and dower rights of their mother, the widow of the deceased. It is also alleged in the bill, that the defendant in error, resided in Lewiston, Illinois, where her husband was employed as a section hand on a railroad; that she had had but a meagre education, and but little experience in business affairs, and no experience in legal matters; that she had not been apprised of what her rights were with reference to the land inherited from her father; and that being in necessitious circumstances, and desirous of receiving the beneficial use and enjoyment of her inheritance, she employed the plaintiff in error as her attorney, to secure for her the benefit of her inheritance, and to conduct a suit in court for that purpose. That by virtue of such employment plaintiff in error, on the 17th day of October 1910, as her solicitor, and as solicitor for her brother George W. Morrow,

filed a bill in the circuit court of McDonough county for the partition of the land referred to. That the plaintiff in error at the

time of his employment as solicitor was, and for a long time prior thereto had been a regularly licensed and practicing attorney and solicitor of the McDonough county bar; and that he was fully informed as to the rights of the defendant in error, in said land; and the value of the land; and had had extensive knowledge of business affairs pertaining and incident to the ownership of land. The bill also alleges, that the defendant in error placed great trust and confidence in the plaintiff in error as her attorney, and relied upon him in good faith, to safe guard and promote her interest in the subject matter of the suit which he had commenced for her; and that at the time said partition suit was started, there was no legal obstacle or practical difficulty in the way of procuring a sale of said land at public auction under a decree of the court; and that said land could have been sold in that way for its full value, and the proceeds would thereupon have been distributed to the heirs and the widow of the deceased; but that the plaintiff in error corruptly and fraudulently designing and intending to cheat the complainant and divest her of her interest in the land in question, for less than one half its value, and to enable himself to procure not only a large attorney fee in said partition suit, but also the greater part of the money to be derived from the sale of complainant's interest in said land, to the great detriment of the defendant in error, and to the plaintiff in error's own advantage and profit, and in violation of his duty as said attorney, induced her to sell her interest in the land to him; that he induced her to sell her interest by falsely and fraudulently representing to her that she might lose all her property if she proceeded in the partition suit; and that there would be a great annoyance and expense occasioned thereby; that it might be impossible to force the sale of the land so that the defendant in error would receive anything for her interest; and that her part of said land might be alloted to her in a por-

tion of the quarter section involved, away from, and remote from the public highway with no right of access, of ingress and egress to and from the same; that all of the land could not be sold so long as the widow

lived; and that the interest he was seeking to buy was only that portion which was not subject to the widow's dower; and that if she would sell her interest to him, she would still retain that portion of her interest in the land which was subject to her mother's dower; and that the defendant in error's undivided interest in said land amounted to but 13 acres, and was not worth to exceed $1000.00; that the defendant in error relied upon the truth of the representations made, and upon the integrity and fair dealing of the plaintiff in error; and believing therefore, that it was to her best interest to do so, on October 19, 1910, agreed with him to sell and convey to him that portion of her interest in the land in question, not subject to her mother's dower, for a consideration of $1500.00, which amount the plaintiff in error then and there represented to her, was more than the value of her interest; and that pursuant to this agreement, she and her husband executed deeds for her entire interest in the land, but believing that she had reserved that portion encumbered by the widow's dower; that the deeds were prepared by the plaintiff in error; and that he inserted the name of his brother in law, James T. Gallagher as grantee; and that the deeds were acknowledged by the grantors before plaintiff in error's notary public; that the plaintiff in error thereupon, in payment therefor, delivered to her his promissory note for the principal sum of $1500.00, payable to her, with interest on March 1st, 1912. That afterwards on or about the 1st day of June, 1911, he paid her $1400.00 for said note, which she then surrendered to him. The bill alleges, that in truth and in fact, the plaintiff in error was the real purchaser of her interest in the land, and that Gallagher had no knowledge of the transaction, or of the fact, that his name had been inserted in the deed as grantee, until after the deed had been executed

and recorded; and that his name had been inserted in the deed for the purpose of concealing the true nature of the transaction; and to conceal the fact that the plaintiff in error was the real purchaser of her interest in the land. The bill also alleges, that upon the execution of the deed referred to, the plaintiff in

error thus pretending and acting as solicitor for James T. Gallagher, on the 27th day of January, 1911, filed in the partition suit a supplemental bill, wherein he falsely and fraudulently represented to the court that Gallagher had purchased her interest, and the interest of her brother George W. Morrow; and thereupon had said cause referred to the Master in Chancery for a hearing upon the supplemental bill; and that he appeared before the Master, as solicitor for Gallagher at the hearing thereof; and adduced the evidence before the Master on said hearing; and contending against said widow in her efforts to establish her right to homestead in said land; and contending for a sale of said land, free and disencumbered from the right of homestead; also contending for a distribution of the proceeds of the sale among the heirs, and said Gallagher; also contending for an attorney fee of $1000.00 to be allowed until the 25th day of April 1911, on which day plaintiff in error sold the interest purchased from her and her brother, to Henry L. Morrow, for the sum of $8534.00, which amount he received and appropriated to his own use; and that he procured a deed to be executed by Gallagher, by which her interest and her brother's interest, purchased by him, were conveyed to the purchaser mentioned. The bill also alleges, that she had employed the plaintiff in error as her attorney, in connection with her brother George W. Morrow; and that the plaintiff in error procured and disposed of the interest of her brother in the land at the same time he procured and disposed of her interest; that her brother brought suit against plaintiff in error to compel him to account for the money received for the brother's share in the land, which suit was litigated in the circuit, appellate and supreme courts of this state, until the May term 1920 of the Supreme court. The bill also alleges, that the purchase price paid to plaintiff in

error, by Henry L. Morrow, for the interests of defendant in error and her brother George W. Morrow, held by the plaintiff in error, and sold to said Henry L. Morrow, was at the rate of $200.00 value per acre. That Gallagher at no time had any beneficial interest in the land or the proceeds of the

sale of the same; but that plaintiff in error received and appropriated to his own use the full amount received by the plaintiff in error for her share and interest, namely $4267.00; and that said amount received by the plaintiff in error, by reason of the premises in equity and good conscience belongs to her, less the $1400.00 paid to her by the plaintiff in error. The bill prays, that the plaintiff in error may be decreed to account to the defendant in error, for the purchase money so held by him, derived from said sale to Henry L. Morrow, together with interest from the date the money was received by the plaintiff in error; and other and further relief. The bill was amended in certain particulars, and finally an answer was filed by plaintiff in error, denying the allegations of fraud and circumvention in the bill, and raising certain issues of fact. The cause was referred to a special Master to take the proofs, and report the same to the court. The evidence was thereupon taken before the special Master, and he reported the same to the court, who heard the case, and found in the decree that the purchase by the plaintiff in error of the interest of the defendant in error in the land in question was n fraud of the relation of attorney and client, which existed between them at the time of the purchase; and that the deed made to James T. Gallagher was procured by means of false and fraudulent representations, and in violation of the confidential relation of attorney and client, existing between the plaintiff in error and the defendant in error at the time of the conveyance, and was a fraud upon the rights of the defendant in error; and that the money, namely $4267.00, received from Henry L. Morrow on April 25, 1911, was the proceeds of the sale made by the plaintiff in error, of defendant in error's interest in the land

purchased by him, by means of the fraud and circumvention referred to; and that in equity and good conscience the money so received belonged to the defendant in error; and that the plaintiff in error should account to her for the same, less the $1400.00 paid, together with interest at the rate of five percent per annum from the date of the filing of the bill of complaint; and decreed

that the defendant in error have judgment against the plaintiff in error therefor in the sum of $3022.29; and that execution issue therefor. A writ of error is prosecuted from this decree.

The facts concerning the relation of attorney and client, existing between the parties, and constituting the fraud alleged to have been committed by the plaintiff in error, are substantially the same as in the case of Morrow v. Compton passed upon by this court, 215 Ill. App. 524; and what was there said in relation thereto, applies with equal force to the present case. The decision of the court in that case is in accord with the settled law on the question involved. Warner v. Flack 278 Ill. 308; Willis v. Berdette 172 Ill. 117; Elmore v. Johnson 143 Ill. 513; Hess v. Voss 52 Ill. 472; Mansfield v. Wallace 217 Ill. 610.

But it is contended, that the defendant in error, was guilty of laches, by the delay in filing her bill of complaint. Mere delay alone, for a period less than that covered by the statute of limitations, is not laches that constitutes a defense. It is only when the delay is accompanied by some other elements rendering it inequitable to permit the owner to assert his right, that laches will bar his right within the statutory period. Hinds v. Sturbeck 260 Ill. 606; Compton v. Johnson 240 Ill. 621; Gibbons v. Hoag 95 Ill. 45; White v. Sherman 168 Ill. 589. In this case the evidence shows, that the defendant in error did not come into full knowledge of the fraud whch had been practiced upon her until about May 1916; and she filed her bill of complaint within five years of that time. A party who is entitled to set aside a transaction, cannot be charged with delay unless he has full know-

ledge of all the facts. Wright v. Stice 173 Ill. 571; Elmore v. Johnson 143 Ill. 513; Peabody v. Burri 255 Ill. 592. A court of equity applies the doctrines of laches in denial of the relief prayed, where the statutory period of limitations has not expired, only where from all the circumstances in evidence show, that to grant the relief, to which the complainant would otherwise be entitled, would presumably be inequitable and unjust to

the defendant because of the delay. Stiger v. Bent 111 Ill. 328. And in this kind of a case, the defense of laches is not regarded with favor; and length of time weighs less than in any other. It is "extremely difficult for a confidential agent to set up an available defense grounded on the laches of his employer." Elmore v. Johnson 143 Ill. 513; Ross v. Payson 160 Ill. 360. For the reasons stated, we are of opinion that the decree of the circuit court should be affirmed; except as to the amount of interest allowed. Concerning the matter of interest, the proof shows that the plaintff in error converted the money which the decree finds legally belonged to the defendant in error, to his own use, and the conversion of the money therefore dates back to the time he received it. Under these circumstances the defendant in error is entitled to interest from the date of the conversion. Bedell v. Janney 4 Gilm. 193; Chapman v. Fox 77 Ill. 337; Smith v. Stoddard 203 Ill. 424; Highway Com. v. City of Bloomington 253 Ill. 164; Schoden v. Schaefer 184 Ill. App. 457. The decree is therefore affirmed in all respects except as to the interest allowed; and that part of the decree is reversed, and the cause remanded with directions to allow the defendant in error interest at five percent per annum from the date on which the plaintiff in error received the purchase from Henry L. Morrow, for her interest in the land in question. Affirmed in part and reversed in part with directions.

General No. 7490 Agenda No. 7

Mary Cordelia Morgan and Helen Morgan, Appellees

vs.

Reliance Life Insurance Company of Pittsburgh, Pennsylvania, Appellant

Appeal from Sangamon.

NIEHAUS, P. J.

In this case the appellees, Mary Cordelia Morgan and Helen Morgan sued the appellant, Reliance Life Insurance Company, in the circuit court of Sangamon County, to recover as beneficiaries of an insurance policy for $1000.00 issued by the appellant July 31, 1917 upon the life of the policy holder, Charles Bryan Morgan, who died September 23, 1918 in France, while engaged in military service, of influenza-pneumonia. The case was tried by the court without a jury, and upon a stipulation as to the facts. The court found that the appellees were entitled to the full amount of the policy, and rendered a judgment for $1000.00; from this judgment an appeal is prosecuted.

It is contended by the appellant on appeal, that under the terms of the policy the appellees were not entitled to recover the full amount of the policy; but only the sum of $205.93; and it appears from the stipulation of facts, that this amount was tendered to the appellees and the tender kept good, and finally paid into court. The question as to whether the full amount of the policy is recoverable, or the sum of $205.93, turns upon the construction to be given the following paragraph in the policy:

"If during the first two years of the existence of this policy, the insured shall engage, outside the continental limits of the United States in Military, Naval or Red Cross Service in time of war, notice must be given in writing to the company, and an extra premium of five percent of the face amount of the policy must be paid to the company before engaging in such service, and a like amount annually during the continuance of such service. If the insured fails to notify the Company, or to pay the

extra premium as provided above, and if he shall die while engaged in such service, or in consequence thereof, the liability of the Company shall be limited to one tenth of the face amount of the policy for each year it has been in force."

It is conceded in the stipulation, that the extra premium of five per cent of the face amount of the policy was not paid by the insured; and that he died while engaged in military service outside of the continental limits of the United States; and it is therefore contended that under the terms of the policy the amount recoverable is limited to one tenth of the face amount of the policy for each year that it was in force, namely, two years; and that this amount together with the accrued dividends of $5.93 constitutes the amount tendered. The appellees insist, that the word "or" in the clause, which refers to the insured's military service, namely, "if he shall die while engaged in such service, or in consequence thereof," shall be construed to mean "and." The effect of this interpretation upon the terms of the contract however, would change the conditions of the liability which were agreed upon. Under the terms as written, if the insured died in military service in France without having paid the extra premium, the company would not be liable for the full amount of the policy, but be liable for the limited amount only; while under the interpretation of the appellees, even though the insured died while in military service in France the company would be liable, unless the insured died in consequence of such military service. The substitution of "and" for "or" would result in an entirely different contract. There is no ambiguity or doubtful meaning in the language used in the policy, and it should therefore be interpreted in the ordinary and usual sense in which it is used. Sandstedt v. American Cent. Life Ins. Co. 109 Wash. 338 (186 Pac. 1069). Where the meaning of the language used, is obvious and simple, there is no room for construction. "Where the language of a contract is ambiguous, courts uniformly

endeavor to ascertain the intention of the parties, and to give effect to that intention; but where the language is unequivocal,

although the parties may have failed to express their real intention, there is no room for construction, and the legal effect of the agreement must be enforced." Benjamin v. McConnell 4 Gilm. 536; Walker v. Tucker 70 Ill. 527; Canterberry v. Miller 76 Ill. 355; Commons v. Snow 194 Ill. App. 569; Reif v. Commercial Cabinet Co. 185 Ill. App. 577; Eagle F. Ins. Co. v. John Spry Lumber Co. 138 Ill. App. 609; Brenzel v. Kirshner 128 Ill. App.736. In ascertaning the meaning of an instrument, the words of an agreement must be construed as they are ordinarily understood. Schreffler v. Nadelhoffer 133 Ill. 536. "If the contract is false to the actual meaning and purpose of the parties or of either party, the remedy does not lie in construction." 2 Parsons on Contracts 617; Hageman v. Holmes 179 Ill. 275.

In this case the court cannot give the construction to the contract contended for, by the appellees, without changing its terms and the obvious meaning of the language used and thereby making a different contract from the one which the parties themselves made. We are of opinion therefore that the appellees were entitled to recover only the limited amount which the policy provided for, which was legally tendered and paid into court, and that the court erred, in giving judgment for the full amount of the policy. Judgment is therefore reversed; and judgment entered in this court for the appellant.

Reversed.

General No. 7498 Agenda No. 14

A. L. Bierbauer, Administrator of the Estate of J. H. Bierbauer, deceased, Appellee

vs.

Joseph Werner, Appellant

Appeal from McLean.

NIEHAUS, P. J.

This suit was commenced by John H. Bierbauer before a justice of the peace in McLean county, against the appellant, Joseph Werner, to recover commissions to which he claimed to be entitled, for bringing about the sale of a 200 acre farm, under a contract with the appellant. The case was tried before the justice, where a judgment was rendered in favor of Bierbauer, for the amount claimed, namely $200.00 An appeal was taken to the circuit court; after the appeal to the circuit court, John H. Bierbauer died intestate; and the appellee A. L. Bierbauer, as administrator of his estate, was substituted as the plaintiff in the suit. A trial in the circuit court, resulted in a verdict and judgment in favor of the appellee for $200.00; this appeal is prosecuted from the judgment.

The evidence tends to show, that the appellant had a written agreement with the heirs of David Werner deceased, and the owners of the 200 acre tract in question, which tract subsequent to the agreement, was sold to Dr. Hawks. The agreement with appellant was to the effect that if appellant sold the land for not less than $275.00 per acre, he was to receive $2.00 per acre commission for the sale; and he collected this commission after the sale of the land to Dr. Hawks. The proof tends to show also, that the original plaintiff in the suit, John H. Bierbauer, agreed with the appellant to help him find a purchaser for the land in question, and that the appellant agreed in case he helped him sell the land, he would give him half the commission to which he would become entitled in case of a sale. Thereafter Bierbauer went to

Dr. Hawks and interested him in the matter of the purchase of the land; and Dr. Hawks told Bierbauer, that he would buy the land at $275.00 an acre; but Bierbauer

tried to sell it to him for $285.00 an acre; after that Dr. Hawks bought it from the appellant at the price first stated. It is contended on appeal, that Bierbauer was not entitled to the commission claimed by him, because the actual sale was not made by him; and because the efforts which he made to sell it to Dr. Hawks for $285.00 did not result in a sale; and because the sale to Dr. Hawks was actually arranged for and made by the appellant; and without any knowledge of what had been done by Bierbauer in the way of procuring Dr. Hawks as a purchaser. The law is well settled, however, that if the broker employed to sell real estate is the procuring cause of the sale; or if by his efforts a purchaser is procured, or the purchaser is induced to apply to the owner through the broker's instrumentality; or through means employed by the broker, the broker is entitled to his commissions in case of a sale to such purchaser; even though the sale is finally consummated by the owner of the property upon different terms than those proposed by the broker. Hafner v. Herron 165 Ill. 242; Rigon v. Moore 226 Ill. 382; Lapsley v. Holidge 71 Ill. App. 652; Ogren v. Sundell 220 Ill. App. 584. If Bierbauer by looking up, the purchaser and interesting him in the land with a view to buying, was the procuring cause of the sale or helped the appellant thereby to make a sale of the land finally, he would be entitled under his contract to one half of the commission collected by the appellant for the sale of the land. Whether the efforts of Bierbauer were the procuring cause, or effectively helped the appellant to make the sale, was a question of fact for the jury to determine. The jury by their verdict determined this question in favor of appellee and the evidence warrants the conclusion reached by the jury. Reed v. Young 146 Ill. App. 210; Taggert v. Ruppert 178 Ill. App. 230; Ogren v. Sundell supra. We find no error, in the admission or rejection of evidence on the trial.

The appellant was not a competent witness under Section 2 Chapter 51 Cahill's Revised Statutes. There was no showing made to the court, that the matters sought to be proved by him came within any of the exceptions provided for in the statute; nor that these matters were material to the issues in the case. The objection to the testimony of appellant there-

fore was properly sustained. Volbracht v. White 197 Ill. 298. A question is raised by appellant about the ruling of the court concerning the opening statement for the defense to appellee's claim, which it is claimed was thereby unduly abbreviated. There is nothing shown in the bill of exceptions in reference to this matter; and this court is therefore not in position to pass upon the question. Alleged erroneous rulings of this character, must be preserved in the bill of exceptions for consideration by a court of review. Harvey v. C. & A. Ry. Co. 123 Ill. App 442. We find no substantial error in the giving or modifying of instructions to the jury. The appellants instructions requested which were refused by the court did not state the law accurately. The record does not disclose any reversible error and judgment is therefore affirmed.

Judgment affirmed.

General No. 7507. Agenda No. 19.

October Term, A. D. 1922

H. B. Krauel, Appellant

vs.

The Decatur Lumber & Manufacturing Company, a Corporation, Appellee.

Appeal from Macon.

NIEHAUS, P. J.

H. B. Krauel, the appellant, commenced this suit in the circuit court of Macon county, against the appellee, The Decatur Lumber & Manufacturing Company, to recover damages for alleged breach of a contract, which the appellant claims he had made with the appellee, to furnish the mill work for the construction of the Roosevelt Junior High School at Decatur. Concerning the alleged contract involved the declaration avers, that the appellee "in consideration, that the said Krauel would receive no other bids for said mill work, and in further consideration, that if the said Krauel should be the successful bidder on said Roosevelt Junior High School, that the plaintiff would purchase mill work of the defendant at its bid, the defendant then and there agreed in writing to manufacture and deliver to said Krauel, in case he was the successful bidder, the said mill work for the sum of to-wit, $20000.00; and that the said Krauel, in consideration of the premises, agreed to receive said bid of the defendant as the only bid for mill work to be furnished for said high school; and agreed that is he, the said Krauel, obtained said contract for building the high school, he would purchase the mill work of the defendant at its price aforesaid." The appellee pleaded the general issue; and the trial resulted in a verdict and judgment in favor of the appellee; this appeal is prosecuted from the judgment.

The main contention on the trial and on appeal, is whether there was a contract actually entered into by the parties.

Whether or not there was a contract between the parties, depends upon what took place between the officers of the appellee company and the appellant, concerning the mill work in question. It appears from the

evidence, that after having a telephonic communication with one of the officers of the company, the appellant went to the office of the company, to get its bid for the mill work, on or about June 25, 1919. The appellant testified concerning this matter, as follows: "I must have gone to the office of the defendant about ten o'clock. The bids were to be opened at twelve o'clock. When I came in the office, I asked for the estimator, and the man said he was the estimator; just what he said his name was, I don't know. I related the conversation we had over the phone. I asked him for his bid on the work for the Junior High School. I related my previous conversation over the telephone. That previous conversation was, that I had asked him for a bid over the telephone, and he said they did not give out any bids over the telephone, and that I would have to come to the office and get the figures; further more, he could not give me the figures on the mill work until he figured my lumber bill. I told him I probably would not be able to give it to him until the next morning, and that was my visit there the next morning. The next morning I showed him a rough estimate of the lumber bill I had made myself, and he said 'we don't like to give out the figure on the mill work unless we give out the combined bid on the mill work and the lumber,' and I said, 'you can figure the lumber bill, but you haven't much time; I will call for it at noon,' and he said he could figure it in that length of time. He asked me if I had a bid on the mill work. I stated I had no figure on the mill work, that I had figured up the lumber roughly, and showed him how I figured it. He said the prices I had used would be sufficient at that time if I would agree to use their figures in preparing my estimate, and if I was low and got the contract and would agree to give them the lumber work, so that they could furnish the lumber

work and the mill work together, and I agreed to do that, and he then gave me his estimate on the mill work. * * * My bid was submitted to the Board of Education about an hour and a half afterwards. In making my estimate for the mill work in that building I used the figure I received from the Decatur Lumber & Manufacturing Company, which was $19137.00. Previous to re-

ceiving this figure, I said to Mr. Kitchen, that I had no figure on the mill work, and if he would give me their figure, I would use it in preparing my estimate, and if I got the contract, I would give them the mill work. He said 'if that is the circumstances, we will give you our figures.' At that time I had no other bids for mill work. * * * They never furnished me any of this mill work." On cross examination Krauel further testified concerning the same conversation: "He did say he was unwilling to furnish a price on the mill work unless he could get the lumber bill also. * * * He said they did not want to put the mill figure out unless they figured their lumber bill in, and when I offered him the Lumber bill the next day, he said he would not have time to figure it before noon, and I said if he would give me his mill figure I would use it in my bid, and if I got the contract on that basis, I would give him the lumber bill to figure. That was all that was said." Thomas V. Jones, who testified that he was the officer who conducted the negotiations for the appellee company, testified as follows: "I am the general manager of the defendant company. I remember the occasion of having some conversation with him on the day before the bids were opened on the Junior High School in this city. The conversation occurred at the office of the Decatur Lumber Company. It was about five o'clock in the afternoon. At that time Mr. Krauel had prepared the estimate marked Plaintiff's Exhibit 1. I had it in my possession at the time of the conversation referred to by Mr. Kraul. Mr. Kitchen at that time was across the street at a barber shop. Mr. Krauel came in, and said he was Mr. Krauel, and says, 'I

understand you made a figure on the mill work,' and I says, 'yes, we have;' and I says, 'have you got your lumber bill with you?' And he says, 'no, I haven't.' I said, 'well Mr. Krauel, I want you to definitely understand that we will not furnish the mill work unless we can also furnish the lumber.' He said to me, 'I could figure the lumber bill, but I can't figure the mill work, and if you will give me the price on the mill work so I can complete my bid, I will bring the lumber bill tomorrow or next day.' * * * I hunted around for Mr.

Kitchen, because Mr. Kitchen had made that list up and discovered that he had gone to the barbershop. I afterwards found the list in the files, and I said; 'now, Mr. Krauel, here is our price on the mill work, but we positively will not furnish the mill work unless we can furnish the lumber that goes on the job.' He said, 'I'll bring you the lumber bill tomorrow or the next day, so you can complete your estimate.' * * * I din not receive the list of the lumber from Mr. Krauel the following day or the day after. I did not have any conversation with Mr. Krauel at all upon the day the bids were being opened, nor have any communication with him the next week or ten days. The first communication we had from Mr. Krauel was the letter enclosing the list of lumber. * * * That was the first communication, and it must have been three weeks afterwards." The evidence shows, that the appellee company made a bid for the lumber contract, but that the same was not accepted, and that the appellant did not purchase the lumber used for the high school in question from the appellee, nor offered to do so at the prices which were quoted to him for the lumber by the appellee. In this condition of the evidence the jury were warranted in the conclusion that the contract for furnishing of the mill work between the parties, was dependent upon the contingency that the appellee company would also furnish the lumber, for the construction of the school building. It is evident the parties never came to an understanding about the furnishing of the lumber, and therefore the contract to furnish

the mill work was never completed; and the verdict and judgment in favor of the appellee was therefore in accordance with the evidence, and the law. We find no reversible error in the rulings of the court in the admission or rejection of evidence.

Complaint is made concerning an instruction which relates to the question of the damages; it is claimed, that this instruction for the appellee, is erroneous. It is unnecessary to consider this question, inasmuch as the jury never had occasion to pass upon the question of damages, having found that the appellee was not liable for damages. We find no reversible error in the record, and the judgment is affirmed.

Judgment affirmed.

General No. 7511. Agenda No. 22.

October Term, A. D. 1922

The Beardstown State Bank, a Corporation, organized and doing business under the Banking Laws of the State of Illinois, Appellee.

vs.

Fred Shaw, Clara B. Shaw, and Delia Shaw, Impld., Etc., Appellants.

Appeal from Pike.

NIEHAUS, P. J.

In this case, the Beardstown State Bank appellee, and a judgment creditor of the appellants Fred Shaw and Clara B. Shaw, filed a bill in equity in the circuit court of Pike county in aid of an execution, which had been issued upon appellants' judgment; and to set aside a certain deed of conveyance of 205 acres of land, made by the appellants Fred Shaw and his wife Clara B. Shaw to their daughter Delia Shaw, on the ground, that the conveyance was fraudulent, and made for the purpose of hindering and delaying the creditors of the appellant Fred Shaw. The bill alleges that the appellants Fred Shaw and Clara B. Shaw, and L. B. Shaw and Frances W. Shaw, were indebted to the appellee on a promissory note in the sum of $8400.00 which was payable, March 1st, 1920, with interest; and that upon the maturity of the note, the appellants neglected and refused to pay the same; whereupon the appellee caused the note in question to be put in judgment, at the November term 1920, of the circuit court of Pike county; which judgment was for the sum of $9362.04; that at the time of the delivery of the note to the bank, the appellant Fred Shaw, was the owner of 377 acres of land in two tracts, one tract being 205 acres, and the other being 172 acres; that on March 1st, 1919, the appellant Fred Shaw, and his wife, executed and delivered to R. C. O. Matheny, a mortgage in the sum of $8000.00 on the first tract of 205 acres; and that there was also an unrecorded mortgage indebtedness against the same

tract, held by the Bank of Louisiana; that on Sept. 1st, 1919, the appellant Fred Shaw and his wife ex-

ecuted and delivered to the Federal Land Bank of St. Louis, Mo., two seperate mortgages upon the 172 acre tract; one mortgage being for $4200.00; and the other for $2700.00; making a total of $6900.00 indebtedness, as against this tract, together with accrued interest. The bill also alleges that L. B. Shaw and Frances W. Shaw are non-residents of the state; and that the appellants Fred Shaw, and his wife Clara B. Shaw have no other property, than the real estate mentioned, out of which its judgment could be satisfied. The bill further alleges, that on April 20th, 1920, after the maturity of the note held by the appellee bank, the appellants Fred Shaw and his wife, together with the appellant, Delia Shaw, their daughter, to whom they had conveyed the 205 acre tract, in order to defeat the collection of appellant's judgment, mortgaged the 205 acre tract for $11000.00 to the New Canton State Bank, which mortgage was unsatisfied. The bill also alleges, as a fact, that after giving the note held by appellee, and before obtaining judgment on the same, the appellant Fred Shaw and his wife Clara B. Shaw, for a pretended consideration of $1.00 executed and delivered to the appellant Delia Shaw, their daughter, then 23 years of age, a deed of conveyance of the 205 acre tract of land; and that after this conveyance to Delia Shaw, and after the maturity of the note held by the appellee, the mortgage to the New Canton State Bank of the 205 acre tract was made; and that out of the $11000.00 thus received from the New Canton State Bank, the $8000.00 mortgage held by Matheny, and also the $800.00 unrecorded mortgage, held by the Bank of Louisiana, were satisfied. The bill also alleges, that the conveyance to the daughter Delia was not real, or for a bona fide consideration; but was made by the appellant Fred Shaw and his wife, and accepted by Delia Shaw, with the intention of defrauding the appellee; and that the 205 acre tract conveyed to Delia Shaw, is held by her, pursuant to a secret understanding, and in trust for the appellants Fred Shaw

and Clara B. Shaw; and for the purpose of defeating a sale of the premises, and satisfaction of the judgment of the appellee. The bill also

alleges, that the judgment of appellee is in full force and effect; and that an execution had issued thereon, and was in the hands of the Sheriff of Pike county, to be levied on any property which may be sufficient to satisfy the judgment. Answers to the bill were filed by the appellants Fred Shaw and Clara B. Shaw, denying the allegations of fraud; answers were also filed by the other parties defendant in the bill. When the cause was at issue, it was referred to the Master, who heard the evidence and reported the same to the court. The court found from the evidence that the equities in the cause, were with the appellee; that the conveyance in question, to Delia Shaw, was fraudulent and void as to the rights of appellant; and that the appellee was entitled to the relief prayed for; and the decree directs, that the sheriff proceed to levy upon the premises designated as the 172 acre tract, and sell the same at public sale subject to the rights of the Federal Land Bank of St. Louis; and that in case the proceeds of such sale be not sufficient to satisfy appellee's judgment, then that the sheriff proceed to subject the 205 acre tract to levy and sale to satisfy the judgment; subject however to the lien of the New Canton State Bank. An appeal is prosecuted from the decree.

The evidence shows, that at the time of the conveyance of the 205 acre tract to Delia Shaw by her father, the appellant Fred Shaw, he was financially embarrassed; the tract conveyed had a value of about $30000.00; but at the time of the conveyance was subject to an indebteaness of something over $8800.00; that it constituted the homestead of the appellant Fred Shaw; and that he and his family resided on the same; and continued to do so, after the conveyance had been made to Delia Shaw, apparently in the same way as before; that Delia who was 23 years of age and a member of the family, was away temporarily at the University of Illinois, where she was a student; that she did not purchase

the land, and had no money to purchase any land; that she did not pay anything for the property; that the consideration for the transfer of the tract to her, according to the testimony of her father and herself, was an understanding, that she

was to assume the mortgage indebtedness of about $8,-800.00; and to pay the expense of the education of her younger sister Mildred, who at that time was about fifteen years of age, and was living at home. The evidence also shows, that the appellee made the conveyance on April 20, 1919, after the indebtedness of $9362.00 had become due to appellee, and was pressing for payment; that legal proceedings were impending, which the appellant Fred Shaw had good reason to believe would finally result in an attempt to satisfy this debt out of his equity of redemption. in the tract in question. It is apparent that this conveyance would necessarily have the effect of putting the title to the tract out of the way of a levy of an execution to satisfy appellee's judgment which he was about to recover against the appellant. It is contended by appellants, that the judgment debtor Fred Shaw, retained property sufficient in value, which could be utilized to satisfy appellee's claim and judgment; and the evidence does show, that the 172 acre tract which was mortgaged for $6900.00 and accruing interest thereon, remained in his name; and there was an effort made to prove, that the value of this tract was sufficient; and the value of this tract was one of the controverted questions on the trial. The estimates of the value of the tract given by the witnesses, varied from 50 to $100.00 per acre; the larger number of witnesses however fixing it at $100.00 per acre. It is clear that with this varying estimate of the value of the land per acre, the actual value of the equity of redemption was somewhat problematical. And under these circumstances a finding could not be justly made, that the value of the equity of redemption, while nominally of sufficient value to equal the amount of the judgment, could be regarded as sufficient and practically certain, to result in a satisfaction of appellee's judgment, if a levy were made thereon. The evidence clearly

shows that the conveyance in question was voluntary, and made pursuant to a secret trust which operated as a hindrance to the creditors of the judgment debtor and was therefore fraudulent in law. What was said in Marmon v. Harwood 124 Ill. 104 applies

with peculiar force to the present case: "In Patterson v. McKinney 79 Ill. 41, where a voluntary conveyance of land had been made by Patterson for the benefit of his wife, the grantor retaining porperty which exceeded in nominal value, the total amount of his indebtedness existing at the time of the conveyance, it was insisted as it is in this case, that the transaction was not fraudulent as against creditors, but the position was not sustained. In deciding the case, the Court held that a voluntary conveyance to the wife or child when the donor is in embarrassed financial circumstance, is fraudulent as to pre-existing creditors, even though the party retains estate nominally in value equal to or more than equal to all his indebtedness." This opinion of the court also emphasizes another feature equally applicable here: "It may be that Mrs. Paist did not at the time she conveyed this property to her daughter, design to defraud her creditors; or it may be that the transaction was not fraudulent in fact,—that she expected to pay her debts from the property she retained, when she made the conveyance to appellant. But however that may be, we think it plain from the evidence introduced on the hearing, the transaction is one which, as against pre-existing creditors was fraudulent in law. What may have been in the mind of the grantor when she conveyed the property to her daughter, is immaterial. The conveyance being voluntary if it resulted in hindering delaying or defrauding creditors, it must be regarded as fraudulent in law." But it may be also said concerning the conveyance under consideration, that it is a reasonable and just inference from the circumstances under which the conveyance was made, that its real purpose was to hinder and delay the appellee in the collection of the judgment which he sought to recover, and therefore fraudulent in fact as well as in law. The findings

and decree of the court are in accordance with the evidence and the law; the decree is therefore affirmed.

Affirmed.

General Number 7515. Agenda No. 25.

October Term, A. D. 1922

Nathan W. Odle, Hattie Alkire, Jennie F. Regan, Miles S. Odle and Miles S. Odle, Trustee, Appellants.

vs.

Robert R. Rodman, Anna R. Campbell, Ella Florence Rice and John Lindsay Odle, Appellees.

Appeal from Vermilion.

NIEHAUS, P. J.

The appellants Nathan W. Odle, Hattie Alkire, Jennie F. Regan, Miles S. Odle and Miles S. Odle, Trustee, filed a bill in equity in the circuit court of Vermilion county against the appellees Robert R. Rodman, Anna R. Campbell, Ella Florence Rice and John Lindsay Odle, to reform a certain part of a written contract which was denominated "Article of family arrangement and agreement of famly settlement." This contract was entered into and signed on the 4th day of October 1920 by the appellants and the appellees and others, who are not parties to the suit. Concerning the basis and subject matter of tnis suit, the contract contains the following statement of agreement between the parties to the contract: "Whereas, the said Miles Odle died seized of certain real estate in the states of Illinois and Indiana, hereinafter specifically mentioned, and a personal estate hereinafter referred to as personal estate; and

Whereas, certain actions at law and in equity are now pending in the several courts of the states of Indiana and Illinois, between the estate, and several of the heirs at law, aforesaid; and between said widow and her children, and between certain of the children and heirs at law of said Miles Odle, seeking to reach and effect the real and personal property of which he died seized and possessed, by, through which, contention and strife has arisen in the family and among the members thereof,

and large expenses being and is likely to be incurred by the several members of the family of the said Miles Odle, and his said sister, and ill feeling and dissension is, and is likely to obtain; and

Whereas, the said widow and children of the said

Miles Odle, and the said sister, for the purpose of conserving and preserving the property in the family, and to avoid waste, and to promote the welfare of the family, and to avoid contention and strife, have come to an agreement as to the rights and liabilities of each of them, and their duties and responsibilities with reference to the affairs of said Miles Odle. Now, therefore it is agreed;

Whereas, several certain actions were brought and now pending in Vermilion county, Illinois, and in Warren county, Indiana, to reach or effect certain real and personal property of Miles Odle, deceased, and attorneys fees and court costs have accrued thereby, both to the estate and to the widow and heirs. IT IS AGREED, that all attorneys fees in the administration of said estate, as well as all of said expenses and all attorneys fees, made by the widow or any of the children of said Miles Odle, shall be paid out of the personal estate. The essence of this agreement being that all costs and expenses which the family of Miles Odle and those acting for them, sustain on account of all litigation, and the administration of his estate, shall be paid by the estate, without any reference to the personal liability of persons paying out money and making debts, so that the estate shall be dimunated rather than individual persons of the widow and heirs."

The bill as amended then avers "that said purported contract and agreement in writing as aforesaid was made in the state of Indiana and recorded in the office of the circuit clerk of Warren county, Indiana, as a part of the records in the case of Sarah E. Odle, et al, v. Anna R. Campbell, et al, pertaining to the will of Miles Odle deceased; that at the time of the execution of said purported contract and agreement as aforesaid;

it was agreed by and between the parties and the counsel or attorneys for the respective parties, that the essence of the agreement should be, that all the costs and expenses which the family of Miles Odle, and those acting for them, sustained on account of all litigation, either of Miles Odle, deceased, pending his life time, and which costs, including attorneys fees to be paid out of the estate of the

said Miles Odle deceased, and the costs of administration of his said estate, shall be paid by the estate as such without reference to any personal liability of persons paying out the money and making debts, so that the estate should be diminished rather than the individual persons of the widow or the heirs, and it is further agreed that under the head of 'attorneys fees' in said purported contract and agreement, that the said Robert R. Rodman, Harley D. Billings and Frazer and Isham should receive for all their services relating to said estate, or for services rendered to Miles Odle deceased, during his life time, which services to the said Miles Odle had to be paid out of his said estate the sum of $28400.00, so that Robert R. Rodman should receive $15900.00 for all of his said services, either rendered to the said estate or to the said Miles Odle deceased, during the life time, and which had to be paid out of said estate; Harley D. Billings should receive $5000.00; and Fraser and Isham $7500.00; that the execution of said writing or supposed contract in the form in which it was drawn, was obtained from Miles S. Odle, Nathan W. Odle, Hattie Alkire and Jennie F. Regan, heirs at law of Miles Odle deceased, by the said Robert R. Rodman by the use of fraud and circumvention, that is to say, the said Robert R. Rodman colluding with Anna R. Campbell, John Lindsay Odle and Ella Florence Rice, to injure and defraud the said Miles S. Odle, Nathan W. Odle, Hattie Alkire and Jennie F. Regan, before the execution of said writing, to-wit on the date said contract was executed, Oct. 4, 1920, or there about, in the said state of Indiana, and the county of Warren aforesaid, and at the time said purported contract and agreement

was signed and executed, did falsely and fraudulently and with intent to cheat and defraud the said Miles S. Odle, Nathan W. Odle, Hattie Alkire and Jennie F. Regan, represent to them, the said Miles S. Odle, Nathan W. Odle, Hattie Alkire and Jennie F. Regan, that he the said Robert R. Rodman, had not been paid for the services rendered to the said Miles S. Odle, ceased, during his life time out of the estate of Miles Odle, and also for the services rendered Anna R. Camp-

bell, as executrix of the will of the said Miles Odle dedeceased, during his life time out of the estate of Miles the sum of $2500.00, when in truth and in fact, the said Robert R. Rodman had been paid out of the estate of said Miles Odle deceased, by the said Anna R. Campbell, as executrix of the will of the said Miles Odle deceased, the sum of $5000.00 for services which the said Robert R. Rodman claimed to have rendered the said Miles Odle deceased, during his life time, and for services rendered said executrix, although he the said Robert R. Rodman, falsely and fraudulently and with intent to cheat and defraud these complainants, represented to them, that he had not been paid a greater sum out of said estate for all of said services heretofore mentioned, either for Miles Odle, deceased, or for said executrix, than the sum of $2500.00; the said Robert R. Rodman at said time, knew that these complainants were relying upon his statements, and the statement of Anna R. Campbell, the executrix, as to the amount the said Rodman had received from said executrix, and knew that these complainants, under his said representations, thought and believed, that the said Rodman had never received a greater sum than $2500.00 for all of said services, when in truth and in fact, he had received the sum of $5000.00 for said services; and that thereupon said Miles S. Odle, Nathan W. Odle, Hattie Alkire and Jennie F. Regan, confiding in the false and fraudulent representations as aforesaid, then and there executed the said writing and purported contract, and not otherwise, and the said Miles S. Odle, as trustee, and these other co-complainants herein further say, that

thereupon the said writing and purported contract was then and there fraudulently delivered to the said Robert R. Rodman and by him fraudulently received, although the said Miles S. Odle, Nathan W. Odle, Hattie Alkire and Jennie F. Regan did not, or would not then, or at any other time, have executed the said purported writing or contract as aforesaid, or otherwise, except by reason of the said false and fraudulent representtations made to them by the said Rodman as to the amount of money which he had received from said exe-

cutrix for said services rendered either to the estate of Miles Odle deceased, or to said Miles Odle during his life time, which was paid out of said estate."

Upon the basis of the averments of fraud and false representations contained in the bill as hereinbefore set forth, the appellants ask the reformation of that part of the contract relating to attorneys fees, so as to include the attorneys fees for services rendered to Miles Odle deceased, during his life time, for which Robert R. Rodman had received the sum of $2500.00 upon a claim filed against the estate of the deceased; and which had been allowed and paid to Rodman prior to the making of the contract and family agreement in question; and also to reform the contract in question by deducting the $2500.-00 which Rodman had collected from the estate for the services referred to; and thereby reducing the amount to be paid him from $13400.00 to 10900.00.

When the cause was at issue, it was referred to the master in chancery to take the evidence and report his conclusions of law and fact; the master reported, that the contract should be reformed in accordance with the prayer of the bill. Exceptions were filed to the master s report, and there was a hearing before the court upon the exceptions. Pending the hearing the appellants amended their bill by making additional averments concerning the controversy and some matters in dispute, namely, "That at the time of the family settlement in the estate of Miles Odle agreed upon at Williamsport, Indiana, it was mutually understood and agreed that all of the attorneys fees

referred to in said contract as coming to Fraser and Isham, Harley D. Billings and Robert Rodman, should be and constitute the sum of $28,400 for all services rendered by said Rodman, Billings and Fraser and Isham, whether said services related to the estate of Miles Odle deceased, or during his life time, which said services to said decedent had been or had yet to be paid out of said estate as a probate claim against said estate, and which sum amounted to $2500.00; and further it was mutually understood and agreed that any sums or amounts which had been paid to Rodman, Billings, Fraser and Isham, by the executrix, either for services ren-

dered to said estate, or for services rendered to Miles Odle deceased, during his life time, which had been or had yet to be paid out of said estate, were to be deducted from said $28400.00 which defendants' counsel were to receive; and that it was mutually agreed, that said sum which had been so paid by said executrix to Rodman and his associate counsel, should be stated in full as deductions in said contract, and by reason of a mutual mistake, it was stated in said contract that Rodman, having been paid $2500.00, he should receive the further sum of $13400.00; whereas, if the true intention and agreement of the parties had been expressed therein, and there had been no mistake in the writing of the contract, as agreed by the parties, said contract would have shown, that Rodman, Billings, Fraser and Isham, should receive for all their services rendered to said estate, or for services rendered to Miles Odle deceased, during his life time, which had been or was to be paid out of said estate, either as a probated claim or otherwise, the sum of $28-400.00, so that Rodman should receive $15900.00; and that whereas said Rodman had been paid the sum of $2500.00 for services rendered the estate, and $2500.00 for services rendered Miles Odle during his life time, and which had been paid out of said estate by said executrix, he shall therefore receive the further sum of $10-900.00."

At the conclusion of the hearing, the court sustained

the exceptions filed to the master's report, in so far as the findings of the master were in conflict with the findings and the decree of the court; and the court finds in the decree, that the appellants failed to prove, that the attorneys fees concerning which the contract was made between the parties should include the fees of the appellee Rodman, which he earned for services rendered in the litigation of Miles Odle deceased, during the life time of the deceased. The court also finds, that there was no mutual mistake of the parties involved in the matters concerning which it was sought to reform the contract. The court also finds, that the appellee Rodman did not make the false and fraudulent representations which are alleged in the bill; and that the appellants are not

entitled to relief on account of the same. But the court makes an additional finding of fact in the decree, namely, that the appellee Rodman was paid by Anna R. Campbell executrix of the estate of Miles Odle deceased, the sum of $2500.00 in liquidation of a claim, which Rodman had filed against the estate of Miles Odle deceased, for services rendered by Rodman to said deceased in his life time, and which claim had been allowed by the probate court of Vermilion county; and then directs that the contract in question should be reformed to the extent of embodying the facts mentioned in the contract, leaving the contract as thus reformed for a construction by the court in any future proceeding. This appeal is prosecuted from the decree.

The main ground urged for reversal of the decree is, that the court should have overruled the exceptions to the master's report, and sustained the findings of the master. The findings of the master were substantially to the effect, that the appellee Rodman at the time the contract in question was made, did not reveal the fact that he had collected the $2500.00 which had been allowed by the probate court on his claim against the estate for services rendered to the estate of Miles Odle deceased, for services rendered in the life time of the deceased; and that by not revealing this fact, he had been guilty of fraud,

and that therefore the contract should be reformed. It should be pointed out in this connection, that the contract could not be legally reformed on the basis of the master's findings, nor for the fraud or false representations which were alleged in the bill, assuming that they had been made. The fraud and false representations alleged in the bill, if proven, might have been ground for asking a cancellation of the contract; but fraud to be the basis for reforming a contract must have operated to prevent the true expression of the mutual contractural intention of the parties. In this case, the evidence does not show any mutual intention to make any different contract from the one which was actually made; nor is there any evidence which would warrant the conclusion that a mutual mistake was made by the

parties in not incorporating into the contract the matter of the fees earned and collected by Rodman, for services performed for Miles Odle deceased, during the life time of the deceased. The right to have a contract reformed depends on mutuality of agreement, or a mutual contractural intent, which has not been expressed in the contract. Silurian Oil Co. v. Neal 277 Ill. 45; Northam v. Quait 215 Ill. App. 444. We are of opinion that the court was fully warranted in finding from the evidence that the allegations of fraud and false representations alleged in the bill were not proven; and that there was no mutual mistakes involved in reference to the matters concerning which it was sought to reform the contract. This finding in effect was an adjudication, that no legal ground existed for the reformation of the contract; and the bill should therefore have been dismissed. That part of the decree which afterwards directs the reforming of the contract by inserting therein the mere statement of the fact that appellee Rodman had collected from the estate the $2500.00 fees for services rendered for Miles Odle deceased, does not reform the contract, and is erroneous. For the reasons stated the decree is affirmed, except as that part containing the finding last referred to, which is reversed; and the cause is remanded with directions to strike the matters referred to from the decree and dismiss the bill for want of equity at cost of the complainants in the bill.

Remanded with directions.

(1781)

General No. 7518 Agenda No. 28

Quincy Railway Company, a Corporation, Appellant

vs.

John Musolino, Appellee

Appeal from Adams County Court.

72

NIEHAUS, P. J.

The appellant The Quincy Railway Company, which operates a street railway on 5th street in the city of Quincy, sued the appellee John Musolino, who owns and runs an automobile truck, claiming damages in the sum of $185.51, for injuries to one of its street cars, which came into collision with the appellee's truck on 5th street. The appellant alleges that the collision in question was brought about by the negligence of the appellee in suddenly backing on to the street railway tracks, and into the front of the street car, which was running in the usual way on 5th street; and that he backed without giving any warning of his intention to back up his truck on to the track and into the way of the approaching car. The case was commenced and tried before a Justice of the Peace, and a judgment was rendered in favor of the appellant; and appeal was thereupon taken to the county court of Adams county, where a trial de novo was had, which resulted in a verdict in favor of the appellee. The court denied a motion for a new trial, and rendered judgment upon the verdict; this appeal is prosecuted from the judgment.

A number of errors are assigned on appeal; but the principal reason urged for reversal of the judgment is, that the verdict of the jury is against the manifest weight of the evidence. It is evident that the verdict of the jury was based upon the testimony of the appellee, who made the following statement concerning the circumstances under which the collision took place: "I started from the corner, 50 feet back of the store and crossed this corner on 5th street, and go right ahead; I started to go north on 5th street, I did not see a street car anywhere; I was

going north on 5th; I was on the right hand side; I never noticed any street cars there; there are some street car tracks; I was in the cab, and

the first thing I heard, bing, and it stopped the truck right on the track, and I seen the street car against me with the right side front all down; after leaving Menke's store on the corner of 5th and Chestnut I did not stop my truck; I had no business to stop; I did not stop; after I left Monke's store and prior to the time the street car struck me; I had no business to back the truck up; I did not back up; I did not stop, and turn the car around in any way; I shifted the gears of the truck; I genreally go slow when I shift the gears from low to second, and from second to high; I should judge, I was running about six or seven miles an hour when I shifted the gear; I had not got into the high gear when I was struck; I was in second." According to this testimony of the appellee, he was driving along the street car tracks at the rate of six or seven miles an hour and never stopped; and the street car ran up behind him and collided with his truck. All the six witnesses in the case, however, who saw the collision, including appellee's witness Bolden testify, that the appellee's truck stopped in the street just before the collision; and four of these witnesses testified, that not only did appellee's truck stop, but it suddenly backed on the street car track, and by so doing came into collision with the street car. Perry Erwin, conductor, who operated the street car in question testified: That he saw Musolino's truck going in a north west direction on 5th street; that it was about 30 feet ahead of the street car; that the truck stopped; that when it stopped it was facing a little to the north east, and was about 30 feet from the intersection of Chestnut street; that there was something like 3 feet space between the truck, and the street car track when the truck stopped; enough space for the street car to pass by the truck in safety without striking it; that at that time the street car was about 15 feet from the truck; and when the car was about 10

feet from

the truck, the truck suddenly backed up without giving any warning; that he tried to stop the car by immediately throwing it into emergency, and applying the brakes; but before he could get the car stopped, the truck had backed into it; and it hit the car right at the door; the door on the east side of the car. He also testified,

that when he saw Musolino's truck he sounded the gong of the car and continued sounding the gong. Mary Lowery testified, that she was a passenger on the car that was struck; and was sitting about the third seat back from the front; and that she saw a big truck all at once; that the motorman was ringing the gong and kept ringing the gong; that when she first saw the truck it was standing in the street; then all at once, it took to backing and backed right into the front end of the street car; and just busted the whole front right in. Harry Muffly, a school boy 15 years old, living half a block south of the place of the accident, testified, that at the time of the collision he was standing at or near the corner of 5th and Chestnut streets; that he saw the automobile truck come up; that it came around from 6th and Chestnut streets; that he was watching it, and it went north of the corner where he was standing; that it was on the east side of the street car tracks, and that about 20 feet from where he was standing, it stopped; and, that he saw the street car coming along at that time; that the gong of the car was being sounded, and that he noticed what the truck did after it stopped; that it backed up kind of catacornered on the street car track, and backed into the street car; that the street car was going slow. James Riddle, another school boy, who lives three doors east of the corner of 5th and Chestnut streets, testified: That he was sitting at the west window of his home and saw the collision and heard the crash; that just before the collision somebody in the back of the truck hollered "look out John"; and that just as he hollered, he saw the truck backing up; and that in backing up, it hit the corner of the street car.

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It is apparrent from the testimony of these witnesses, nearly all of them entirely disinterested, that on the issues of fact in the case the verdict is manifestly and clearly against the weight of the evidence; we conclude therefore, that the case should be submitted to another jury. The judgment is therefore reversed and cause remanded.

Reversed and Remanded.

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(0 1 4 9 1)

General No. 7519 Agenda No. 58

A. B. Hilty, Appellee

vs.

The Estate of Martin W. Deem, Deceased, H. B. Phillips, Admr., Appellant

Appeal from Clark.

723

NIEHAUS, P. J.

A. B. Hilty the appellee filed a claim in the county court of Clark county against the estate of Martin W. Deem deceased, for $890.00. He claimed a one fourth interest in a Liedeker drilling machine, which had been sold by the appellant, H. B. Phillips, as administrator of the estate for $4000.00. The evidence shows, that Hilty the claimant was a skilled mechanic, and practical oil driller and had had charge of the drilling machine for the deceased for several years prior to his death, in drilling for oil and gas at different points in Indiana; the last place being Albany. There was a hearing on the matter of the appellee's claim in the county court, and a judgment allowing the claim; an appeal was taken to the circuit court, where a jury trial was had, which resulted in a verdict in favor of the appellee for $785.00. The claimant remitted $80.00 from the amount of the verdict, and judgment was thereupon rendered against the estate for $705.00. From this judgment an appeal is now prosecuted. W. S. Barkhurst, who is local manager of the Oil Well Supply Company, testified concerning claimant's interest in the machine referred to, as follows: "I knew M. W. Deem for ten years; he was engaged in the business of contracting for and drilling oil wells. I had a talk with Deem prior to his death in regard to Hilty; G. W. Wentling was present; Deem stated, that he had given Hilty a one fourth working interest in the drilling machine, that they had at Albany at that time; that he had made arrangement with Hilty, I forget the amount, but

I believe it was $8.00 per day; and when the machine had netted $4000.00 he would make an assignment of one fourth interest to Hilty; and at any time Hilty was dissatisfied he would take back the ma-

chine at 75 per cent of what the net earnings would be. He stated, that the account would be carried on as it had been heretofore; Hilty had nothing to do with the business end of it until the assignment was made." This conversation took place in the latter part of the year 1918; Deem died in October 1919. The testimony of Mr. Barkhurst was not in any way contradicated, and shows with sufficient clearness, that the deceased had a contract with Hilty concerning his work, and management of the machine in question; that when the machine had earned a net amount of $4000.00, he would acquire a one fourth interest or ownership in the machine. The evidence discloses the fact, that the machine in question earned $10393.00; and that the sum total of expenses in connection with its operation was $6021.93; showing, that the net earnings amounted to about $4371.00; which sufficiently establishes the claimant's right to a one fourth interest; although an assignment thereof had never been formally made. The evidence also discloses, that the administrator recognized the appellee's claim of interest by making payments thereon to the amount of $290.00 which when deducted from appellee's ~~claim~~ share of $1000.00 left a balance due to the claimant of $705.00, the exact amount of the judgment. It is contended by the appellant, that the claimant had no legal right to file a claim against the Deem estate because if his claim were established, it would make him a partner of the deceased; and that the county court has no jurisdiction on matters of partnership. The proof concerning appellee's claim, did not show a partnership relation, but only a contract arrangement by which a joint ownership resulted to the extent of a fourth interest in the machine in question. Nor can the contract between the appellee and the deceased be regarded as unilateral inasmuch as by its terms a mutual obligation was incurred. The machine having been sold by the order of court,

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and the estate having received the entire proceeds of the sale, the appellee was legally entitled to his one fourth share thereof. The record does not disclose any reversible error, and the judgment is affirmed.

Judgment affirmed.

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(315a)

General No. 7526. Agenda No. 31.

October Term, A. D. 1922

Uffie Wieties, Appellee.

vs.

James C. Davis, Director General of Railroads and Agent under United States Transportation Act, operating Illinois Central Railroad, Appellant.

Appeal from Sangamon.

NIEHAUS, P. J.

Uffie Wieties, the appellee, commenced this suit in the circuit court of Sangamon county, against the appellant, James C. Davis, as Director General of Railroads, and acting agent under the United States Transportation Act, in the operation of the Illinois Central Railroad, to recover damages for the destruction of his automobile on April 13, 1919 on a railroad crossing, known as Capitol Park Crossing, in the northerly outskirst of the City of Springfield. The legal grounds upon which he bases his right of recovery are, that the crossing, which was constructed of wooden planks, was in a defective condition, at the time in question; and that because of such defective condition appellee's automobile which was driven by his son, became stalled on the crossing, and before he could extricate it, that the appellant's train came along and smashed it; also, that when the appellee's automobile was stalled upon the track, it was visible to appellant's engineer in charge of the running of the train, for a distance of at least a mile, and that the engineer by the exercise of reasonable care, could have avoided the destruction of it. There was a trial of the case, which resulted in a verdict and judgment for appellee, fixing the amount of his damages at $600.00. This appeal is prosecuted from the judgment.

There is evidence in the record tending to sustain both charges of negligence in the declaration. It tends to show

that the planks were worn down, especially the plank just west of the second rail, which was down several inches below the surface of the other planks; and ai-

so considerably below the surface of the rail. In the regular course of travel the vehicles had to go over the crossing diagonally in a northeasterly or southwesterly direction, which was not at right angles with the rails. Fred Wieties, appellee's son who drove the automobile in question, testified with reference to the occurrence as follows: "I started to drive it, I was going for him out into the country. I had occasion on that trip to cross the railroad track of the Illinois Central at what is known as Capitol Park Crossing. I was going northeast, when I came to the railroad crossing, I looked both ways to see whether a train was coming. I could see to the north a mile. The track was straight in that direction. There was no train as far as I could see, then I started to cross the crossing. * * * As I got to the second rail of the first track, my front left wheel hit the second rail and it turned it down toward the track. The boards are awfully low there. *** I tried to go over the rail, and as I tried to go over the rail, my car skidded toward the track. The car ran down the track a full length of the car. During that time I was trying to go over the rail, and as I tried to go over the rail, my front left wheel kept even with the rail, just kept it going down the track. * * * I was going to back up, I tried to go over the rail again. I happened to look up and saw the train coming. At that time it seemed like it was more than a half a block, I am not sure how far it was. I jumped out on the west side and was not hurt." * * * "From the time the car first swerved until I left the car, would be three or four minutes. When I left the car it was headed right toward the train." Thomas B. Scott, locomotive engineer in charge of the train which hit appellee's car, directly contradicts the testimony of appellee's son as to the manner and the time of crossing, and with reference to the stalling of the car, but it

was clearly the province of the jury to determine which of these witnesses considering their testimony in connection with the other evidence in the case, gave the true version of the occurrence. We think that the jury were warranted in believing the testimony of the driver of the car, and this court would not be justified in holding they

should have believed the locomotive engineer's version of the accident. We find no reversible error in the admission or rejection of evidence; nor does there appear to be any error in the refusal of the instructions which the appellant insists should have been given. The instructions given for appellant fully and fairly present the points of law which the appellant had a right to rely upon in defense. The record does not disclose any reversible error, and the judgment is affirmed.

Judgment affirmed.

General No. 7537. Agenda No. 61.

October Term, A. D. 1922

Jake Zimmerman, Appellant.

vs.

J. A. McCreery, H. A. McCreery, and J. R. McCreery, doing business under the name of J. A. McCreery & Sons, Appellees.

Appeal from Mason.

NIEHAUS, P. J.

Jake Zimmerman, the appellant, commenced this suit under Section 132 of the Criminal Code, in the circuit court of Mason county against the appellees,, J. A. McCreery, H. A. McCreery and J. R. McCreery, doing business as McCreery & Sons, to recover treble the amount of money alleged to have been lost by his son George Zimmerman, in gambling in grain futures, in violation of Section 130 of the Criminal Code, which provides, "that whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain, or other commodity, stock, etc., * * * where it is at the time of making said contract intended by both parties thereto that the option whenever exercised, or the contract resulting therefrom, shall be settled, not by the receipt or delivery of such property, but by the payment only of differences in the prices thereof * * * shall be fined * * *; and all contracts made in violation of this section shall be considered gambling contracts and shall be void." There was a trial by jury, which resulted in a verdict of not guilty. The appellant made a motion for a new trial, which was denied by the court; and judgment thereupon rendered on the verdict in favor of the appellee. This appeal is prosecuted from the judgment.

The record discloses, that the grain deals or trades involved in the transaction between the parties took place in

Mason City, where the appellees maintained a business office; the deals and trades related to the purchase and sale of corn for future delivery, and were carried into effect by the appellees in connection with certain brokers in Chicago who were members of the Board

of Trade. The main error assigned, relates to the testimony of witnesses given on the trial over the objection of the appellant, concerning the manner and form of handling deals and trades involving purchase and sale of grain for future delivery on the Board of Trade in Chicago; witnesses who were connected with broker corporations or firms as employes or in some capacity, were called and allowed to testify. The witnesses testified, over the objection of the appellant, to matters concerning trade and grain deals handled on the Board of Trade in Chicago, and how the trades and deals placed there by the appellees were handled. Also testified, what the intentions of the firms or corporations whom they represented in the transactions were concerning a future delivery of the grain involved in the deals, and the rules and regulations of the Board of Trade in relation thereto; and what these broker firms and corporations would have done in reference to a delivery of grain, involved in the trades or deals handled by them, if the deals or trades had not been closed out, but had been allowed to remain in force until the month fixed for delivery. This evidence was incompetent as well as immaterial under the issues in this case. And the testimony of the witnesses referred to, concerning the intentions of the broker corporations or firms was after all, only the opinion or conclusion of the several witnesses. Moreover, what the intentions of the several brokers, who handled the deals on the Board of Trade, were, concerning a delivery, as well as the conclusions of the witnesses, as to what these brokers would have done if the grain deals had been allowed to remain in force, related to an event that never happened. The intention of third parties with reference to grain deals or trades, even if shown by competent evidence, would not tend to prove or dispove what the arrangement

or understanding was between the parties. As was pointed out in Jamieson v. Wallace 167 Ill. 388: "The question here in issue is with reference to the dealing and understanding between the appellants and appellee, and not in regard to the knowledge and understanding of parties in New York. If the understanding between appellants and appellee was that the deal as between themselves should be settled upon differences, and that there

should be no delivery of the stocks, then the contracts as between them were gambling contracts, and within the statute."

In Partridge v. Culter 168 Ill. 504 practically the same question here involved, was considered and decided. The court there said: "The issues between the parties to the suit were few and simple, and neither the Board of Trade as a corporation, nor its other members as individuals were in any manner concerned with them. * * The only issue on that question was, as to the nature of these transactions as between the plaintiff and the defendant, and all the facts, near or remote, bearing on that question, and all the other issues in the case were in the knowledge of four or five witnesses, yet the issues were so misapprehended, that the Board of Trade and its rules and regulations were made the subject of investigation. * * * It is not claimed, that all dealings on the Board of Trade are gambling transactions, while, perhaps, no one will deny, that a part of the business transacted there is of that character. Plaintiff might have made bona fide purchases and sales for actual receipt and delivery in every instance, but the forms adopted could be used with equal facility by counter purchases and sales and settlement of differences, for illegal and illegitimate dealings as between him and the defendant. Although these deals were closed out before maturity, and the transactions ended as between the parties to the suit, the plaintff was permitted by the court, against objections, to go into long examinations as to what would have been done, if they had not been closed out. * * * This evidence was immaterial. * * * It made no difference what the character of the contracts were as

between the plaintiff and other members of the Board of Trade with whom they were made, nor what his liability to them would be at the maturity of the contract."

It is clear under the authorities cited, that the admission of the evidence referred to, was error; and that it may have misled the jury into an erroneous conclusion as to the legitimacy of the deals and transactions be-

tween the appellant and the appellees. We conclude therefore, that this case should be submitted to another jury; and the judgment is therefore reversed and cause remanded.

Reversed and Remanded.

General No. 7547 Agenda No. 49

October Term, A. D. 1922

Martin Airola, Appellee

vs.

L. A. White, Appellant

Appeal from Sangamon.

NIEHAUS, P. J.

The appellee, Martin Airola, sued the appellant L. A. White, in the circuit court of Sangamon county, to recover damages on account of injuries received by him in consequence of the alleged negligent driving by the appellant of his automobile, at a point on the hard road between Edwardsville and Staunton, Illinois, by means of which the appellee was struck, and knocked down upon the ground, and seriously injured. There was a trial by jury, which resulted in a verdict and judgment in favor of the appellee, for $1500.00 damages. This appeal is prosecuted from the judgment.

It is the appellee's contention, that on January 9th, 1922, he and three others were riding along on the hard road from Staunton to a point about five miles north of Edwardsville, where they had motor trouble; thereupon they turned their automobile around, and started back to Staunton; after traveling about two miles toward Staunton, they discovered a Ford automobile in the ditch on the east side of the hard road; it was then about seven o'clock in the evening, and after dark. They stopped their automobile on the east side of the road, and went to the assistance of the driver of the Ford automobile, who turned out to be an acquaintance of the appellee. Appellee's party, with the help of others, succeeded in getting the Ford car back upon the concrete road, and had pushed it across the road opposite to the side upon which their car was standing. The Ford car was facing toward the south in the direction in which it was to go; and appellee's car was facing north in the direction in which it was to go.

The concrete road at this point is about sixteen feet wide. The distance between the two automobiles was variously estimated by the witness-

es, as being from five to eight feet. According to the testimony of appellee, after the Ford car had been righted, and put in position, to proceed towards its destination, he was standing next to the Ford car, having a few words of conversation with George Darling, the owner and driver of the Ford car, when the appellant, who with his sister was returning to Springfield, from St. Louis, came driving along in a Dodge Roadster at a high rate of speed, exceeding thirty miles an hour; and without slacking his speed, and without giving any warning, drove in between the cars which were standing upon the highway; and in doing so, knocked him down, and dragged him along for a distance of about twenty feet on the road. The appellant claims however that he gave a warning signal of his approach; and that he slackened his speed, as he approached the scene; to about ten or fifteen miles an hour; and that as he was going along between the cars at that slow rate of speed; and that the appellee, apparently to cross the highway, suddenly stepped in front of his car, and before he could stop it, was knocked down upon the ground. One of the elements of damages claimed by the appellee on the trial was, that by reason of his injuries he was incapacitated for a time in looking after his business; and that it was necessary for him to employ a man by the name of Fortuna to take his place in the conduct of his business; and that he had to pay him therefor, at the rate of $130.00 a month. Objection was made to this evidence, on the ground that there is no averment in the declaration claiming such an element of damages; and another objection was, that there was no competent proof, that the amount paid, was a fair, and the usual and customary price paid for the services rendered. The court overruled the objections, and allowed the testimony to be given; and the ruling of the court is assigned as error. Both of the objections were well taken; and should have been sustained. Other errors assigned, relate to the giving

and refusal of instructions; and the modification of one of the instructions presented by the appellant. The second instruction given for the appellee is as follows:

"The Court instructs the jury, that if you find from the evidence that the plaintiff has proved his case as laid

in his declaration, or any count thereof, by a preponderance of all the evidence, then you may find the defendant guilty."

It has been repeatedly held that the giving of an instruction like the one recited, is error. Bernier v. Ill. Cen. Ry. Co. 296 Ill. 472; Wendrinski v. Madison Coal Corp. 282 Ill. 32; Krieger v. Aurora E. & C. R. R. Co. 242 Ill. 544; McFarlane v. Chicago City Ry. Co. 288 Ill. 476; Loughlin v. Hopkinson 292 Ill. 80. And in this case the error was emphasized by the fact that one of the counts of the declaration charged the appellant with the breach of the duty of exercising "great care" in driving along the highway in question, which is a higher degree of care than he was charged with by law. But the appellant is not in position to insist on a reversal of the judgment on account of this error, because he committed the same error in the fourth instruction given in his behalf, in which the jury were told that they should not find the defendant guilty unless the plaintiff had proved that the defendant was guilty of the negligence and carelessness as charged in the plaintiff's declaration or one count thereof. Decklieder v. Chicago City Ry. Co. 172 Ill. App. 557. The court gave four instructions for the appellee, and nine instructions for the appellant; one of the instructions was modified by the court; but the modification made was not erroneous. The court refused to give fourteen instructions requested by the appellant, and error is assigned on the refusal of each one of these. The seventh refused instruction is as follows:

"The court instructs the jury that if you find and believe from the evidence in this case, that the plaintiff Martin Airola at the time, and immediately before the accident mentioned in the evidence, was upon and attempting to cross the public highway, and that he was in a position of peril and danger, and that he saw or could have seen, by the exercise of ordinary care, the defendant's motor car in time to have avoided coming in contact with said motor car, and if you find that he failed to do so, then the verdict must be for the defendant, not guilty."

This instruction in a measure, embodies the appellant's theory of defense; and the point was not covered

by any other of the instructions given for appellant. He was entitled to have this instruction given; and it was error to refuse it. Casey Admr. v. Grand Trunk & W. Ry. Co. 165 Ill. App. 108; Sibert v. Shoal Creek Coal Co. 181 Ill. App. 11. We find no error in the refusal of the other instructions.

For the reasons stated however, the judgment is reversed and the cause remanded.

Reversed and Remanded.

General No. 7551. Agenda No. 64.

October Term, A. D. 1922

Samuel Mosbarger, Appellee.

vs.

George W. Brown and Mary E. Brown, Appellants.

Appeal from Piatt.

NIEHAUS, P. J.

In this case the appellee, Samuel Mosbarger filed a bill in equity to foreclose a mortgage executed by the appellants George W. Brown and Mary E. Brown, his wife to secure an indebtedness of $7000.00 evidenced by a promissory note of that amount, dated Oct. 2, 1920, bearing interest at the rate of 7 percent, and due one year after the date. The mortgage also provided for a solicitor's fee in the sum of $350.00; and became a lien on the property described therein, which was the home farm of the appellants, containing about 40 acres. The bill also prayed for the appointment of a receiver. To this bill, the appellants filed a joint and several answer. The answer admits the ownership of the property sought to be foreclosed; that they occupy the land and had occupied it for forty years; that the appellant George W. Brown has been engaged in farming all his life; and is about sixty five years of age; that he had little business experience of any kind, and no experience in the buying and selling of real estate; that he had seldom been outside of the state, and was not acquainted with lands, or their values outside of his own immediate neighborhood; that the appellee Samuel Mosbarger is an acquaintance of forty years standing, and was his confidential friend and advisor; that they were young men together; that the appellee had been his neighbor for more than twenty years; that during sixteen years of that time they were members of the Antioch church, a country church situated in Unity township Piatt county; that they were elders and deacons in the church together for more

than sixteen years, and attended religious services and worshipped together; that the appellant and his wife had unbounded and implicit confidence in the appellee, and in his honesty integrity and business sagacity; that

the appellee was a real estate agent with H. L. Middleton of Kansas City, Mo., Basil J. Meek of Chillicothe, Mo., president of the Basil J. Meek Company, and B. S. Parker, agent of Meek, and W. T. Green, who was stenographer in the office of said Meek, entered into a conspiracy for the purpose of defrauding the appellant out of his home; that in the fall of 1919, the appellee came to the home of appellants with Middleton and advised him, and induced him to accompany the appellee to Carrollton, Mo.; that he informed the appellee that he knew nothing about Missouri land, and that if he went to Carrollton with him, he would have to rely on the appellee in making any trade or buying any land; that the appellee represented to him that the land in the vicinity of Carrollton was very good soil, equal in value, fertility and productivity to the good black land in Illinois; that the appellee showed him a sample of the soil in a box, of the land which Middleton and Meek had for sale, and promised to procure for him an 80 acre tract, which was equal in value and fertility to Illinois land, that was then selling for $400.00 per acre; that the appellee agreed, that he would see, that the appellant could buy the land for $175.00 per acre; that he told the appellee, he would have to rely on him in reference to any trade and that the appellee agreed, that if Brown bought a farm that he would see that the farm which he purchased would be well worth the money and one from which the earnings would make interest and principal payments as they matured; that the appellee represented, that he would agree to assume the responsibility of any and all business contracts which the appellant might enter into with Meek and Middleton; that he knew they were honorable and reputable dealers in real estate; and that their honesty and integrity was beyond question; and that they expected to do and had done a lot of business with Illinois farmers, and

that any representations made by them, they would live up to; the answer also alleges, that the appellee, Basil J. Meek, H. L. Middleton, B. S. Parker and W. T. Green conspired together to have him place a mortgage on his home farm in exchange for land in Missouri, and intended to cheat and defraud him and did so, by taking him

out to Missouri and showing him a good farm in the vicinity of Norborne, comprising 200 acres; that this land had corn growing on it which would make about 60 bushels per acre; that while near this land the appellee pretended to be desirous of purchasing an 80 in that neighborhood. That the land shown him, and on which he had shucked the corn, was good level fertile land; but that in making the contract with him, they contracted that he buy a piece of land which he had never seen, pretending that it was the land they had shown him. The answer also alleges that Meek, Middleton and the appellee were present in the hotel at Carrollton, Mo., with the appellant, when the contract for the purchase of the Missouri land was made; and that the appellee, Middleton and Meek represented to him that he was buying the farm he had seen on which he had shucked corn; and that it annually raised such crops as he saw thereon; that to induce him to buy, Middleton and the appellee agreed to sell his 40 acre tract of land in Piatt county for $16000.00, if he would agreed to buy the 200 acre tract of Missouri land for 175.00 per acre. The answer also alleges, that the appellee as agent for Meek and Middleton and Green and Parker, knew that the 200 acre tract was not owned by any of the parties named; that they did not have it for sale, but were showing him the tract referred to for the purpose of inducing him to enter into a contract to buy a farm which he had never seen. The answer also alleges that the appellee repeatedly represented that he could and would sell appellant's farm in Illinois and that the land which he was contracting to buy, and on which he had shucked corn on the day referred to, was well worth the sum of $175.00 per acre; and that the appellee influenced him to enter into the

contract for the purchase of said farm for the sum of $35000.00, representing that he knew the land which the appellant was contracting to buy would pay the interest and principal as it matured. The answer also alleges, that the appellant paid $2000.00 on the purchase price, and agreed to assume notes and mortgages for the balance of the purchase price. It is also alleged in the answer that the

Missouri land described in the contract was several miles distant from the farm he had seen; but that the parties mentioned had induced him to believe, that he had contracted to buy the land he had seen; that Green was not the owners of the land in question, but that the land was owned by Edward Musson who on or about March 4, 1920, conveyed the land to Basil J. Meek, and Meek conveyed the land to W. T. Green on March 9, 1920; and that Green gave deed of trust to Basil J. Meek on the above described land, securing three notes amounting to the principal sum of $16000.00; and that previous thereto, March 4, 1920, a loan had been made on said premises to the Connecticut Mutual Life Insurance Co. to secure a note in the principal sum of $9000.00, which was a prior lien to the $16000.00 trust deed; that Green and wife on March 6, 1920, thereupon executed a warranty deed conveying said land to the appellant. That about February 19, 1920, Middleton and the appellee procured of the appellants a promissory note of that date for the principal sum of $8000.00 payable to the order of B. S. Parker, trustee, due several months after date, and that the appellee and Middleton induced the appellant and his wife to make a trust deed to secure said note, which was on the home farm of appellant, and the same property involved in this suit; that this trust deed was recorded in Piatt county on the 24th day of February 1920 with directions to mail to Basil J. Meek. The answer also alleges, that the appellee had knowledge that the land described in the contract and warranty deed from Green to appellant was very low land, wet, untillable unproductive and composed of a soil commonly known as muck; and that a right of way existed over it for a drainage ditch and silt basin, which

basin included 40 acres and was the outlet for a drainage district; that the appellant would not have entered into the matter of the purchase of the Missouri land except for the representations of the appellee, and the other parties mentioned. The answer also avers that at the time of the giving of the note and mortgage for $8000.00 to B. S. Parker, trustee, the appellant had not become acquainted with the fraud, and imposition

practiced upon him by the appellee, Meek, Middleton, Parker and Green, in selling him a different tract of land; and that in all these matters he had relied upon the business acumen sagacity and integrity of his old friend, the appellee; that he consulted him in the execution of the note and mortgage and was induced to sign the same by appellee's representations, that he would sell his 40 acre tract previous to the maturity of the note which it secured; and that the appellee knew of the false and fraudulent representations made to him by the other co-conspirators and aided abetted and assisted them in perpetrating the fraud in question. The answer also alleges that previous to the purchasing in October 1920 the appellee began negotiations with the appellant and his wife to procure a payment or renewal of the $8000.00 note and mortgage, and that the appellee arranged with Meek, that he would acquire said note and mortgage, and that this was done in order to cut off any defense which the appellant and his wife had to the original note and mortgage; that the appellee offered to aid and assist appellant in extending the $8000.00 mortgage. The answer also charges that Meek, Parker, Green, Middleton and the appellee conspired together for the purpose of securing the new note and mortgage which is involved in this foreclosure suit; that the appellee and Middleton still representing that they could and would sell the 40 acre farm owned by the appellant, and the appellee representing that if they did not make a new note and mortgage, they would lose their home place and that the appellant had no defense to said indebtedness. The answes also alleges that at the time of the execution of the note and mortgage in question,

the appellant was not mentally competent to cope with the superior mentality of the appellee, Meek, Middleton, Parker and Green, but was induced to sign the same by the false and fraudulent statements and misrepresentations made by the parties; and was, at the time of the signing of the original note and trust deed, sick and in bed with the flu; and that the note and mortgage in question involved in this suit was procured by fraud and deceit and undue influence prac-

ticed upon him by the appellee; and that the consideration of the $7000.00 note in question which purported to come from the appellee, really came from the other parties who were co-conspirators with the appellee, and was furnished by them.

A replication was filed to the answer of appellant, and the cause was thereupon referred to the master to take the testimony and report his findings and conclusions, which was done. The master reported that the appellants George W. Brown and his wife Mary E. Brown executed and delivered the promissory note and mortgage involved for $7000.00 to the appellee on October 2, 1920; and that the same was given for value received; that the indebtedness represented by the note and mortgage was due and payable, and that the appellee was entitled to recover thereon, the amount of the principal; and for accrued interest, $803.50; and a solicitor's fee of $350.00, making the total amount due the appellee, $8153.50; also that the note and mortgage was executed and delivered by the appellants to the appellee in good faith; and that there was no evidence that the appellee obtained execution and delivery of the note and mortgage by fraudulent means; and that the same was a valid obligation of the appellants. Objections were filed to the master's report by the appellants, and to his findings, which were overruled. The objections were thereupon allowed to stand as exceptions; and upon a hearing of the cause, the exceptions were overruled, and the court rendered a decree in conformity with the findings of the master, and directing a foreclosure of the mortgage. This appeal is prosecuted from the decree.

The evidence in the record strongly sustains the averments of fraud and circumvention, in the answer; it discloses that the appellant George W. Brown is a farmer residing near Atwood, in Piatt county, upon a farm containing about 40 acres, upon which he has been residing the greater part of his life; that he is a man about sixty five years of age, and of inferior mentality; that he has had very little education, and practically no business experience, except what he acquired in connection with the management of his small farm. The appellee is a man

of business sagacity and tact, and apparently was appellant's friend; he and appellant were members of the same church; and co-workers in the church; and the appellant had great confidence in the business judgment of the appellee, and implicitly trusted in his integrity. The evidence shows, that the appellee for several years prior to the making of the note and mortgage in question, had been engaged in the business of selling Missouri land in conjunction with H. C. Middleton of Kansas City, Mo., and Basil J. Meek of the Basil J. Meek Land Company of Chillicothe, Mo., and other parties connected with the land company mentioned; that in the latter part of the year 1919, the appellee with H. C. Middleton made representations to appellant, by which they interested him in the matter of the purchase of Missouri land; and finally in January 1920, induced appellant to go with them to Carrollton, Mo., where the appellant was met by Meek, and other parties connected with the Meek Land Company; and some of these parties, and the appellee, took the appellant out to a 200 acre tract of land near Norborne, Mo., under the pretense of wanting to sell him this tract of land, which was of excellent quality, and still had upon it some of the crop of corn that had been raised thereon, in the previous season, and which indicated a yield of about 60 bushels to the acre; and that the appellant shucked some of the corn, which was on the land to satisfy himself of its quality and the extent of the yield. That thereupon the appellant was taken back to the hotel at Carollton, and the par-

ties pretended to sell him the land which he had seen; and drew up a contract of sale, apparently for the land he had seen, but which was in fact a contract for another different tract of land, much inferior in quality, and of much less value. The evidence is clear, that this fraud was perpetrated upon the appellant; that the appellant in the belief that he was purchasing the land, which had been shown him, paid the Basil Meek Land Company $2000.00 in cash as a part of the purchase money under this fraudulent contract of sale; afterwards a trust deed was exacted from him, to B. S. Parker, trustee, who also was connected

with the land company mentioned, upon his 40 acre home farm in Piatt county. This trust deed was made to secure a note of $8000.00, for another part of the purchase money, which matured October 2, 1920. After the maturity of the $8000.00 note and mortgage, the appellant was induced by the appellee, acting in conjunction with Basil J. Meek and Middleton in the premises, to substitute the note and mortgage involved in this case, paying $1000.00 on the principal, and paying the interest which had accrued, and appellee's commissions, which he had earned in the land deal in question. The inference from the evidence is practically conclusive, that the note and mortgage to appellee was the final act in the fraudulent scheme by which the appellant was cheated not only out of the land, which the parties to the scheme pretended to sell him, but out of $3580.00 in money; and if the decree of the court were carried into effect would also cause him to lose his home and farm. While the appellee may not have intended in the beginning that the parties, who perpetrated the fraud upon appellant, should go to the extent they did, in carrying it into effect, the evidence clearly shows, that the fraud was accomplished by his direct aid; and that he acted in concert with the parties who accomplished it from the beginning to the end of the deal, which was the giving of the mortgage to him; and that he thereby procured the commission for his services. The mortgage in question, was the final act in the nefarious transaction referred to, by which all parties connected therewith expected to realize the

full beneficial results of their efforts; and it is therefore tainted with the same fraud that permeates the entire transaction. "Fraud vitiates everything, and no one can take advantage of his own wrong, or of a fraud practiced for his benefit with knowledge of the fraud." Garritson v. Bray 277 Ill. 158. Under the facts disclosed by the evidence, it would be grossly inequitable to allow a foreclosure of the mortgage in question, and the decree is therefore reversed, and the cause remanded with directions to dismiss the bill for want of equity.

Reversed and remanded with directions.

(3/372)

General No. 7552. Agenda No. 1.

April Term, A. D. 1923.

Abner C. Barr, Defendant in Error,

vs.

Angela Barr, Plaintiff in Error,

Error to the City Court of the City of Litchfield, Montgomery.

HEARD, P. J.

Abner C. Barr, defendant in error, on July 1, 1920 filed in the City Court a bill for divorce against his wife Angela Barr, charging in detail that she was guilty of extreme and repeated cruelty, and also alleging that on January 5, 1918 she drove him out of their home at Alton, Illinois, and, on that date wilfully deserted him and has ever since persisted in such desertion and that the same has continued for the space of two years. In October 1920 a hearing was had and a decree for divorce entered in said cause and it is this decree which Plaintiff in Error now here seeks to have it reviewed.

The case was heard in open court without a Jury and the evidence upon which the decree was based is not preserved by certificate of evidence and it is contended by Plaintiff in Error that the finding of facts in the decree are not sufficient to sustain it.

The findings in the decree as to the statutory grounds for divorce are as follows:

"The court further finds that they were legally married on October 10, 1898 at Alton, Illinois and parted on the 5th day of January 1918; that Angela Barr is guilty of wilful desertion for a period of more than two years and upwards prior to the filing of complainant's bill for divorce and without any reasonable or just cause

for such desertion; and that every material allegation that is charged in the complainant's bill for divorce has substantially proven."

In Harlem v. Suburban R. Co. 202 Ill., 301, the Court said:

"In case the facts are preserved in the decree, it must find specific facts. The mere statement of legal conclusions is not within the rule." In Berg v. Berg 223 Ill., 209 the Court said:

"In chancery cases the practice is well settled in this state that the party in whose favor a decree granting relief is entered, to maintain it, must in some way otherwise or the decree must find the specific facts that otherwise or the decree must find the specfic facts that were proven on the hearing, and that it is not the duty of the party against whom the decree is rendered to perserve the evidence. No presumption will be indulged that evidence sufficient to maintain the decree, not appearing in the record, was heard, and if the evidence is not properly preserved, the decree will be reversed upon appeal."

The same rule is laid down in Rybakowicz v. Rybakowicz 290, Ill., 550, and French v. French 302, Ill., 152, the later a seperate maintenance case in which it was held that a finding in a decree for seperate maintenance that the complainant is living seperate and apart from her husband without fault on her part is a mere conclusion and is not of itself a finding of an ultimate fact which will support the decree.

Testing the decree in the present case by the rule laid down we must hold that the decree does not contain a sufficient finding of specific fact to sustain it. The decree is therefore reversed and the cause remanded.

General No. 7557 Agenda No. 4

April Term, A. D. 1923.

V. V. Rardin, Appellee

vs.

David Hartley, Appellant

Appeal from Circuit Court of Edgar.

HEARD, P. J.

This is an appeal from a judgment for $75.00 in favor of appellee in a suit brought by appellee against appellant to recover for legal services claimed to have been rendered by appellee for appellant.

Appellant claims that the court erred in overruling his motion to require appellee to give a bond for costs. The bill of exceptions does not contain the motion or any of the matters in relation thereto and in accordance with the decisions of the Supreme Court and this Court this question is not properly before us for our consideration.

It is claimed by appellant that the court erred in the exclusion of evidence but the abstract does not disclose when the question was raised in the trial court.

The appellee rendered legal services for appellant is not disputed but it is claimed these services were rendered under a written contract between appellant and three lawyers of whom appellee was one. The written contract in question was a contract whereby the three attorneys agreed to take a certain case in Douglas County to the Supreme Court on writ of error, while appellee's claim is for services rendered in the circuit court.

The judgment appears to be supported by the evidence in the case and it will be affirmed.

General No. 7485 Agenda No. 51

October Term, A. D. 1922

Frank Broux, Plaintiff in Error

vs.

The People of the State of Illinois, Defendant in Error

Writ of Error to the Circuit Court of Christian County.

SHURTLEFF, J.

Plaintiff in error was convicted for violating Section 28 of the "Prohibition Act," charged with unlawfully having in his possession property designed for the manufacture of intoxicating liquor, sentenced, and has brought the record to this court, on writ of error, contending that a new trial should have been granted.

It is first contended, that the evidence does not support the verdict and that under all the facts and circumstances as proven, the jury was not warranted in finding, beyond a reasonable doubt, the guilt of plaintiff in error.

We have carefully examined all of the evidence and read the testimony. Plaintiff in error was a coal miner living in the city of Pana, and working one day per week. In November, 1921, he rented a small house or "shack" on a truck farm, back from the road about one-half mile, in the timber, about five miles southeast from Pana, from one Merrifield, the ostensible purpose being, that plaintiff in error had taken a contract to cut sprouts on the farm of Frank Einig and was to have the use of the house or "shack" to live in while performing such work. This house was in broken and rough land and timber, and brush concealed it from view, along the road. Merrifield had taken everything out of the house, except

some doubletrees and garden tools, when plaintiff in error took possession, on the Sunday prior to Thanksgiving Day. Plaintiff in error entered possession on that day and was at the house or "shack" every day, from Sunday until the following Friday; during the early part of the week he was at the house, in company with others and proceeded to cover the entire building with paper, and covered one of the windows and placed a shade in the other window of the "shack." On some days, plaintiff in error did not go to the "shack" until late in the afternoon, remaining

until after dark, and the testimony showed that he visited the "shack" or house in the evening and in the night, accompanied by others. A new padlock was placed upon the door, which was found locked Friday evening. There was a saw mill, in the woods, about forty rods distant, where men were working during the day. During the week after Sunday, one or more automobiles visited this "shack" every evening, always going after night fall. A private, winding roadway, led from the highway to the "shack" through the brush and timber. On Friday evening, November 25, 1921, an officer with assistants, went to the "shack" and broke into it. They found the door locked, but managed to gain an entrance. They found five barrels of corn mash, two oil stoves, two cans of oil and a laundry stove. The mash was fermentnig and created quite a noticeable odor. Some of the testimony showed that the mash was "bubbling" and one witness testified that it was about ready for the "still." Later, about eight o'clock of the same evening, plaintiff in error, with a friend, drove down the private way, from the highway to the "shack" and in attempting to cross a small stream in the vicinity of the "shack," in an automobile, one wheel of the car was broken and plaintiff in error was arrested. No work had been done on the contract to cut sprouts at $2.00 per day.

No other person or persons had had access to the "shack" since Sunday, except plaintiff in error and those he had taken to the place. Plaintiff in error, while testifying, contradicts none of these facts, except that he disclaimed all knowledge of the mash, and on this Friday evening, he states, he had gone to the home of a friend, who was the owner of a good coon hunting dog, and with his friend and the dog, was proceeding to the timber to "hunt coons," in which assertion, plaintiff in error is corroborated, although after the accident, while there were several in the officer's posse, none of them happened to see the dog, which had escaped.

It is next contended by plaintiff in error that under the indictment the People must prove that the property was possessed by the defendant, and that it was intended to be used by the possessor for the illegal manufact-

ure of liquor. The second count of the indictment charged the defendant with unlawfully possessing "property designed for the illegal manufacture of liquor" and plaintiff in error insists that the evidence shown by the first three witnesses on behalf of the People, who lived on the Enig farm near the "shack," that numerous persons passed along the highway near the "shack," but that there was not a scintilla of evidence that Broux, himself, was ever in the "shack" or knew what was in the "shack" and that there was no evidence whatever that Broux at any time ever owned or had in his possession the barrels of corn or cooking utensils, found by the deputy sheriff, and insists that to wararnt a conviction upon the evidence which is denominated circumstantial, that the rule of law in this state is well settled that if the circumstances proved are susceptible of explanation upon any reasonable

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hypothesis consistent with the innocence of the accused, the defendant should not be convicted.

It is true that plaintiff in error, at the time of his arrest, was searched and no key to the padlock, upon the "shack," was found upon his person, and therefore plaintiff in error insists, that inasmuch as no one had ever seen him entering the shack in question

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and there were other persons frequenting that vicinity, the circumstances afforded the ground for a new hypothesis that some other person trespassing upon plaintiff in error's possession, had unlawfully entered the premises and placed the barrels of corn or corn mash in the building and placed their padlock upon the shack. We are not inclined to spend much time or lengthy argument upon this hypothesis. The statute covers those who have or possess. Plaintiff in error is shown to be in possession of the premises, to have attended them every day for six days, to have been engaged in painting the shack; that his visits to the premises generally were late in the afternoon, in the evening and in the nighttime, so that, in the opinion of this court, the evidence was amply sufficient to warrant the jury in believing beyond a reasonable doubt that plaintiff in error was not only in possession of the

premises but that such possession included the shack and building and the contents. It is true the law is that the guilt of the accused must be so thoroughly established as to exclude every other reasonable hypothesis. **Purdy v. People,** 140 Ill. 46; **People v. Rischo,** 262 Ill. 586; **Marzen v. The People,** 173 Ill. 43. The language of the statute is "have or possess." Possession is defined as the detention or enjoyment of a thing, which a man holds or exercises by himself or by another, who keeps or exercises it in his name. Bouvier's Law Dictionary. Also, possession means simply the owning or having the thing in one's power. It may be actual or it may be constructive. **Brown v. Voikenberg,** 64 N. Y. 80. It implies a present right to deal with the property at pleasure and to exclude others from meddling with it. **Sullivan v. Sullivan** 66 N. Y. 37-41; **Baragiano v. Villiani,** 117 Ill. App. 372. It was held in **Amick v. Young,** 69 Ill. 542, that the fact

that a party was in actual possession of a building, which was personal property, making and paying for repairs upon it and exercising other acts of ownership, furnishes presumptive evidence of ownership in him. A party in possession of personal property is presumed to be the owner of it, possession being one of the strongest evidences of title to personal property. **Gilbert v. National Cash Register,** 176 Ill. 288; **Comer v. Comer,** 120 Ill. 420.

In view of all the evidence in this case there is no reasonable grounds for believing the hypothesis presented by plaintiff in error to this court, and the verdict is supported by the evidence, beyond a reasonable doubt.

Plaintiff in error contends that there is no evidence in this case showing that the barrels of corn mash found on the premises were designed or intended for the illegal manufacture of liquor. Clause 6 of Section 2 of the Prohibition Act provides: "The term 'still' wherever used in this Act shall be construed to include any mechanism, apparatus or device kept or maintained for the purpose of distilling, making or manufacturing intoxicating liquor which by any process of evaporation, separates alcholic liquor from grain, molasses, fruit or any other fermented substance, or that is capable of any such use."

It is true that no witness testsified that even liquor

could be made from the corn mash, but in the opinion of this court the Prohibition Act as passed in 1921, a clause of which is above quoted, takes legislative notice of the facts that stills are used to manufacture liquor and that liquor may be separated by process of evaporation from grain. We think this is a matter of common knowledge of which all courts would take judicial notice, but if there be any question about it, the legislature has laid before the judiciary the notice of such fact. The witness Springstun says that the corn mash was fermenting; that it was about ready to

go to the still; that it was bubbling up on top. There were five barrels of this corn mash, two oil stoves, two tubs, a laundry stove, etc. The law is that the intent may be inferred from the acts of the person charged with crime, as well as by words and declarations. The intent with which the act is done is a question of fact either to be shown by the declarations of the party or to be inferred from the character, manner and circumstances of the act. **Lathrop v. The People,** 197 Ill. 169; **Crosby v. The People,** 137 Ill. 325.

Taking into consideration the purpose for which this shack was rented or pretended to be used by plaintiff in error, and all of the surrounding circumstances in this case, it would be almost a matter of common knowledge, that plaintiff in error, if he was in the possession of the shack or charged with its possession, could have the five barrels of mash as described for one purpose, and one purpose only, and that would be to evaporate the alcohol and separate it from the grain.

Plaintiff in error objects to instruction number 9 and 10 given in behalf of the People. Number 9 informed the jury that if they believed beyond all reasonable doubt that the defendant rented the building or structure in which the mash in question was found, and that after such renting the defendant was in the actual control or domination of such building or structure and that the mash in question was found in such building at a time when the defendant was exercising control and dominion over the same, then "you may take such evidence into consideration in determining whether the

mash in question was in the actual possession of the defendant Frank Broux."

Instruction number 10 informed the jury that, "if they believed from the evidence that the defendant had in his possession five

barrels of corn mash, and that such corn mash was designed and intended to be used in the illegal manufacture of intoxicating liquor, then, and under such circumstances, you should find a verdict of guilty under the second count of the indictment." Plaintiff in error insists that these instructions separate out particular pieces of evidence and call to the attention of the jury and make prominent, certain portions of evidence in the case, and that the instructions are not upon the law of the case. It is an elementary rule that in giving instructions a court should not single out and give prominence to specific facts, but it is a rule that is subject to exceptions. It is proper and often necessary to single out evidence where such evidence is necessary to prove a material fact, or where the evidence may only be admissible for a certain purpose. **Siebert v. The People,** 143 Ill. 571; **The People v. Casey,** 231 Ill. 261; **The People v. Curtright** 258 Ill. 430. In People v. Curtright **supra,** the court held, page 440, as to a similar instruction: "The whole purpose of the instruction was to tell the jury that the defendant would have no right to kill his wife because she had been guilty of improper conduct with another man and had written certain letters to the other man, and the jury could not have been advised of the law in that regard without mentioning the facts."

Instruction number 9, **supra,** is not a peremptory instruction. It is merely an instruction directing the jury what facts should or could be taken into consideration in determining the question of possession under the special language of Section 28 of the Prohibtion Act, and instruction number 10 is merely, in broad language, a definition of the second clause in Section 28 of the Prohibition Act as covered by the second count of the indictment and points out to the jury the nature of evidence required to convict under the second count and is only such an instruction

as a court, in a murder case, might give, pointing out the **corpus delicti** and the intent. We do not consider that these instructions violated the rule as claimed by plaintiff in error.

It was held in a very late case, **People v. Heard,** 305 Ill. 324, that while many of the instructions were inaccurately drawn and many of them were subject to the criticisms made by the plaintiff in error, still the court held that regardless of the instructions, the jury gave plaintiff in error the benefit of every extenuating circumstances surrounding the killing of the deceased and he is in no position to complain of the error. The court further held that while there is no legitimate excuse for the prosectuor tendering to the court numerous instructions that do not state the law with reasonable accuracy, we can not require absolute literalness and technical accuracy in instructions, because such a requirement would, as a general rule, defeat the ends of justice and bring the administration of the criminal law into disrepute and just contempt. It is sufficient when the instructions considered as a series substantially present the law of the case fairly to the jury; and the court further say: "Where it can be said from the record that the errors assigned could not reasonably have affected the result of the trial, the judgment of the trial court should be affirmed." **People v. Cleminson,** 250 Ill. 135; **People v. Michael,** 280 id. 11; **People v. Haensel,** 293 Ill. 33; **People v. Lloyd,** 204 id. 23.

Plaintiff in error points out certain instructions submitted to the court in behalf of plaintiff in error which were not given but in every case upon an examination of the instructions given we find that the subject matter of these instructions was fully and sufficiently incorporated in the instructions as given by the court, and that the series of instructions sufficiently and substantially

instructed the jury as to the law applicable to this case, and seeing no error in the record the judgment of the lower court should be affirmed.

Judgment affirmed.

General No. 7513 Agenda No. 24

October Term, A. D. 1922

Thomas J. Vidler, Appellee

vs.

Clara E. Humphreys, et al., Appellant

Appeal from Circuit Court of Christian County.

SHURTLEFF, J.

Thomas J. Vidler, appellee, filed his bill of complaint in the Circuit Court of Christian County seeking to foreclose a real estate mortgage given to his father, John Vidler, to secure two notes of $300.00 each, one due in two years and the other due in three years after date, with interest at ten per cent. The notes and trust deed securing the same, were dated the 6th day of Decmber 1877. Neither party to this suit, either by statement of the case nor by abstract, properly indexed, has set out in any manner, the notes, trust deed, endorsements or payments claimed to have been made thereon, whereby the court can arrive at the issues in this case. We have been compelled to search the record in order to make a statement of the case. Counsel should comply with the rules of this court.

There appear to be various endorsements upon the notes, commencing with 1878 and continuing at various times until January 18, 1905, at which time there is an endorsement on each note of one hundred seventeen 50-100 dollars, and on each note appears an identical endorsement: "Paid on the within as interest twelve and 50-100 dollars October 15, 1914."

Appellee, Vidler, became the owner of said notes, as the sole heir of his father. There was a general settlement between appellee and Mr. Humphreys, the maker of the notes, in 1892, and all the interest on the two notes was paid up to that time, but not in money; the payment was the attorney fees owing to Mr. Humpreys by appellee. The payee in these notes, the elder Vidler, died in 1898.

The notes and trust deed were signed and executed by E. A. Humphreys, an attorney, and it was stipulated that the mortgagor conveyed to his wife, Clara Hump-

hreys, after the execution of said mortgage, a life interest in Lot 5, in Block 8, in Railroad Addition to Pana, the same being part of the lands mortgaged, and that E. A. Humphreys and Clara Humphreys, his wife, resided on these premises at the time of the mortgagor's death, and that Clara Humphreys, the widow, has continued to reside there ever since.

It further appeared by stipulation that Arthur E. Humphreys, the only child of the mortgagor, conveyed by quit claim deed, all of his interest in Lot 5, Block 8, in Railroad Addition, to appellant Joseph Werner, April 6, 1918. The last endorsement on the notes, made October 15, 1914, during the lifetime of the mortgagor, it was shown, was an attorney's fee owing to the mortgagor Humphreys, by Nina Vidler, daughter of the complainant, and it appeared by the evidence, testified to by Nina Vidler, Paul J. Vidler, son of the complainant, and by the complainant, Thomas J. Vidler, that the circumstances in connection with this payment were as follows: Humphreys, the mortgagor, came to the office of the complainant to make some complaint in regard to his gas stove. The daughter, Nina Vidler, was indebted to the mortgagor in the sum of $25.00 for attorney fees. Complainant at that time called Humphreys back into his private

office and told him that he would settle the fee of $25.00, owing to him, by his daughter Nina Vidler, and Humphreys told him to credit the fee on the mortgage notes. It further appears that Humphreys said to "credit it on the mortgage notes," but did not specify what mortgage notes and no notes were there at the time. There were no other mortgage notes in connection with the affairs of the mortgagor and said complainant, except the two mortgage notes in question.

As to the endorsement on the notes in 1905, at that time complainant and the mortgagor were officing together and the endorsement covered attorney's fees owing by the complainant to the mortgagor and no cash was paid. In fact, the last three credits upon either note, the one in 1892, the one in 1905 and the last endorsements in 1914 grew out of attorney fees as stated,

and no cash was paid at either time.

During a great number of years complainant and his father had paid the taxes upon the lands secured by this mortgage, and at one or two different times had taken a tax deed covering the lands.

The defendants, Clara Humphreys, the widow and Joseph Werner, filed answers, pleading the Statute of Limitations. There was a hearing in the lower court and a decree entered in favor of the complainant, decreeing a foreclosure upon said mortgage indebtedness and including therein certain payments of taxes, made by the complainant, upon said lands, in pursuance of the provisions of said mortgage or trust deed. The defendant Joseph Werner has appealed from the decree of the lower court and assigned error upon that decree The defendant Clara Humphreys has not appealed.

It is contended by appellant that the complainant Thomas J. Vidler, was an incompetent witness; that the mortgagor E. A.

Humphreys being dead, renders him an incompetent witness under Section 2 of the Act on Evidence and Depositions, and appellant quotes **Albert Commission Co. v. Sessel,** 193 Ill. 153; **McCann v. Atherton,** 106 Ill. 31; **Pyle et al v. Oustatt,** 92 Ill. 209; **Maloney v. Maloney,** 65 Ill. 406; and **Bivens v. Harper,** 59 Ill. 20. The statute provides that no party to any civil action or person directly interested in the event thereof, shall be allowed to testify therein of his own motion or in his own behalf when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic or distracted person, or as the executor, administrator, heir, legatee or devisee of any deceased person, or as guardian or trustee of any such heir, legatee or devisee, unless when called as a witness by such adverse party, etc.

We have examined all of the cases cited by appellant and none of them apply to the facts in this case. The complainant, Thomas J. Vidler, was an interested party in the suit, but the question is whether the appellant Joseph Werner was defending in any of the capacities set out in this statute. His grantor, the son and heir

at law of the mortgagor, if he were a defendant to this suit, could properly raise this objection; but having conveyed his interest in the porperty to the appellant, appellant is now defending as a grantee and not as an heir at law of the mortgagor. The terms of the statute do not protect a grantee or a defendant who defends as a grantee.

Bivens v. Harper, supra, sustains the objection, for the benefit of an heir of an heir **ad infinitum,** because of the use of the word "heir," but appellant, defendant in this case, as a grantee, and not as an "heir," does not come within the rule.

In this case no objection was made, in the record, to the

competency of the complainant's evidence until after complainant had testified and completed his examination, when a motion was made by appellant to strike out this evidence. This motion came too late, and in addition to the testimony of complainant, as to all of the facts and circumstances of the payment in 1914, the same facts were testified to by the daughter, Nina Vidler, and by appellee's son, Paul J. Vidler, which testimony established substantially the same facts, as to the endorsement in 1914, established by complainant's testimony.

Appellant contends that after twenty years have elapsed from the time the notes became due, the law presumes them to have been paid and quotes **Longworth v. Baker,** 23 Ill. 430, **and Locke v. Campbell,** 91 Ill. 417.

The Longworth case arose out of a petition to sell real estate, in the probate of an estate where the debt was created in 1828, and the debtor died in 1834 and no proceedings were commenced to charge the lands with the payment of decedent's debt until 1855, and the court held that such delay was laches. In the Locke case it was held that twenty years possession by the mortgagee, without act of acknowledgement of any subsisting mortgage, is a bar to the equity of redemption. The facts in neither of these cases are similar to the facts in this case. Appellant further contends that a partial payment of a note does not take it out of the operation of the statute, unless accompanied by an express acknow-

ledgment of further indebtedness, quoting **Keener v. Crull et al** 19 Ill. 189 and **Ayers v. Richardson,** 12 Ill. 148. In Keener v. Crull it is held that the new promise may arise out of such facts as identify the debt, the subject of the promise, with such certainty as will clearly, "determine its character, fix the amount due, and show a present unqualified willingness and intention to pay it, at the time acted

upon and acceded to by the creditor, the promisee." The facts in this case arose out of the statement of a father seventeen years after the origin of the debt, in which the father made this statement: "That he had agreed to give his daughter $200 per year for her work, and he had not paid her yet, and she had gone to Ohio," and the court held it was not such a statement or promise as would bind the father.

In the Ayers case it was held that where the items of an account are read to a party, and he admits the correctness of each item and of the whole account, but as to certain items, stated that he thought the whole or a part of them had been paid by his son, and that he thought the account was correct, and that he would see his creditor and settle with him, held such admissions do not show a new promise within five years.

In **Stein v. Kaun,** 244 Ill. p. 32, the mortgage was given in 1894, more than ten years before the filing of the bill, and the Statute of Limitations had run against it unless tolled in some way. The interest was paid on the $2500 debt from the time it was first incurred in 1891 to December 16, 1905. The court held that the payment of interest on a promissory note stops the running of the Statute and that a suit to foreclose a mortgage securing a promissory note may be begun at any time within ten years after the last payment on such note.

In **Metcalf v. Metcalf,** 219 Ill. App. at p. 103, the court held that a partial payment on the debt, made by the party originally chargeable, and received thereon by the party who owns the notes, which evidence the debt, implies a new promise, by the debtor to pay the debt, and this is equally true whether the payment is before

or after the bar of the Statute of Limitations has become complete, quoting **Kallenbach v. Dickinson,** 100 Ill. 427. Specifi-

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cally, Section 16 of the Limitations Act provides that actions on bonds, promissory notes, bills of exchange, etc., or other evidences of indebtedness, in writing, shall be commenced within ten years next after the cause of action accrued; but if any payment, or new promise to pay, shall have been made, in writing, on any bond, note, bill, etc., or other written evidence of indebtedness, within or after the said period of ten years, then an action may be commenced thereon at any time within ten years after the time of such payment or promise to pay, and this section was construed in **Schifferstein v. Allison,** 123 Ill. at page 662, in which the question was discussed, that the note or indebtedness was the principal part and basis of the foreclosure suit and held that the foreclosure could be brought within ten years after any payment made upon the indebtedness, and the same holding is made in **Kreitz v. Hamilton,** 28 Ill. App. 566.

In this case the original maker of the notes made the payment by the application of the attorney's fee voluntarily, and at his request, the amount was endorsed upon the mortgage indebtedness, and in the view of this court, whether the Statute of Limitations had, at that time, run or not, under the statute and the decisions of our courts, it renewed the indebtedness.

Appellant contends that under Section 11½ of the Limitations Act, in force July 1, 1915, requiring an extension agreement to be recorded in five years and allowing the holder of such encumbrance five years from July 1, 1915, to obtain extension of agreement, this statute should be applied in this case, and that no such agreement having been secured, complainant is not entitled to a decree. But as held in **Metcalf v. Metcalf,** 219 Ill. App., p. 114: "The statute gave the holder of such an encumbrance five years from July 1, 1915, in which to obtain an extension agreement, and this

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suit was begun and tried and reached a decree and the appeal was prosecuted to

this court and the cause taken under advisement here, before the end of said five years. We think the statute is not now applicable to this case." The same rule should apply in this suit, as the bill was filed in the month of November, 1918, before the expiration of said five years.

Appellant contends that the holder of a tax deed is not entitled to reimbursement for the taxes paid and for subsequent taxes, and quotes **O'Connell v. Sanford,** 255 Ill. at page 49, which was a condemnation proceeding, in which the entire property was taken for public use. In this matter of tax deed, appellant also quotes **Miller v. Cook,** 135 Ill. page 190; **People v. Ogden,** 195 Ill. App. 563; **Sanitary District v. Murphy,** 261 Ill. 269; **Riverside v. Townsend,** 120 Ill. 9 and 186 Ill. p. 432.

In O'Connell v. Sanford, **supra,** it is plain that in an action of eminent domain where the holder of a tax title was made one of the parties and where the court holds that the deed was void, such holder would not be entitled to any part of the compensation.

In the case of Miller v. Cook, **supra,** the question arose between the holder of a tax deed and a mortgagee, and raises questions as to marshaling of assets, between these adverse interests.

In **People v. Ogden,** the county treasurer and **ex officio** county collector sought by bill in equity under the statute to foreclose the lien of certain tax judgments against certain specific lands and involved principally the question of the reimbursement to the purchaser of the tax title. None of the cases cited by counsel apply to the facts in this case. The equity of the complainant, to be reimbursed for taxes paid and advanced, is based upon the covenants in the mortgage or trust deed which specifically authorize the holder of the mortgage indebtedness, in case taxes are not paid by

the mortgagor, to pay them and add the same to the amount of the principal indebtedness secured by the mortgage.

There is no question raised in this case, and could be none, as to the payment of taxes where the mortgagee has simply taken and holds the receipt for such pay-

ment. No provision of the mortgage requires the mortgagee to pay these taxes. If the mortgagee pays them, they are paid for his own protection and by the covenants in the mortgage may be added to his mortgage debt. Nothing is shown in this record or even claimed that the mortgagee or holder of the indebtedness has ever sought to acquire title or possession to the lands by virtue of a tax deed. It may be, and frequently is, necessary in many cases, for mortgagees and trustees, who have not promptly attended to the payment of taxes, prior to the sale of the lands for taxes, in order to protect their security, to redeem the lands from tax sale and in some cases to buy in an outstanding tax title. In a case of this kind, where the only purpose of the tax deed was to protect the mortgagee's interest in the land and no action ever having been taken, to secure possession or title thereby, we know of no reason why a tax deed may not be used by a mortgagee as evidence of indebtedness based upon the payment of taxes, the same as the tax receipt would be evidence of such payment. In the opinion of the court the contention of appellant in this regard is not well grounded.

Seeing no error in the decree of the lower court, the same should be affirmed and it is hereby affirmed.

Affirmed.

General No. 7523 Agenda No. 60

October Term, A. D. 1922

Lewis K. Pearl, as Administrator of the Estate of Mary Louise Pearl, deceased, Defendant in Error.

vs.

William J. Jackson, as Receiver of the Chicago & Eastern Illinois Railroad Company, a Corporation, Plaintiff in Error.

Appeal from the Circuit Court of Vermilion County.

SHURTLEFF, J.

This is an action under the statute by defendant in error, administrator, against plaintiff in error for causing the death of Mary Louise Pearl, a child eleven years of age, in a collision at a crossing in the village of Alvin on the third day of April, 1921. Defendant in error's intestate, Mary Louise Pearl, and her sister Hazel Bernice Pearl, were struck and killed by a fast passenger train of the Chicago & Eastern Illinois Railroad Company at the West Railroad street crossing while riding in an automobile with their father and mother. The father and mother were riding in the front seat of the automobile. the father driving the car and the children were riding in the back seat.

Defendant in error's declaration, upon the case was tried, consisted of five counts. The first count charged general negligence in the management and operation of the train. The second count charged that no bell, of at least 30 pounds weight, or steam whistle placed on the locomotive engine was rung, or whistled, for the distance of at least 80 rods from the said crossing, where the accident occurred, in violation of the statutory requirements in that respect. The third count charged that the train was being run at the high and dangerous rate of speed of 60 miles per hour in violation of

the village ordinance of Alvin, which limited the speed of trains to 10 miles per hour. The fourth count charged the existence of the city ordinance, as set out, and averred that the defendant, in violation of its duty prescribed by said ordinance, negligently, maliciously, willfully, wantonly and recklessly and with gross negligence, drove and propelled

the said locomotive and train in the village of Alvin along said track and at and near the said crossing at a high and dangerous rate of speed of to-wit, 60 miles per hour, and that because of said violation of said ordinance and the careless, negligent, wanton and willful driving of the said locomotive engine and train, at said high and dangerous rate of speed, while the said Mary Louise Pearl with all due care and diligence was riding across the railroad, at said public highway crossing, in an automobile, said locomotive engine and train ran upon and struck, with great force and violence, the said automobile, and thereby, etc. The seventh count averred that while Mary Louise Pearl was then and there with all due care and diligence riding a certain Ford automobile across said railroad at the said crossing upon said street, the defendant by its servants, so carelessly, negligently, maliciously, willfully, wantonly and recklessly and with gross negligence drove and managed said engine and cars, and that by the running thereof, the same ran into, upon and over the said Mary Louise Pearl, whereby she was then and there killed, etc.

In all of the counts of the declaration due care and caution on the part of defendant in error's intestate was charged in the language:—"While the said Mary Louise Pearl with all due care and diligence was riding across the railroad at said public highway crossing," and in none of said counts is it averred that defendant in error's intestate was exercising any care at all while approach-

ing said crossing, neither is the age of said child charged nor that her parents were exercising any care on her behalf. Lewis K. Pearl is the administrator of the estate of the deceased.

Plaintiff in error assigns error on the ground that Margaret Pearl, wife of defendant in error, was permitted to testify in this case, under the rule laid down in **Thomas v. Anthony,** 261 Ill. 288; and **Craig v. Miller,** 133 Ill. 300, and it would be conceded that this was error, except it was not objected to upon the trial. Margaret Pearl was called as a witness by defendant in error, permitted to give her entire testimony without objection. After her examination, direct and cross, had been completed, plaintiff in error made the objection: "I move to exclude the testimony of Margaret Pearl insofar that she

testified to looking either by her husband or by herself in approaching the railroad tracks. There is no averment in the declaration of ordinary care by either parent, and is is a variance between the pleadings and proof as to a material matter." Even the objection made does not go to the competency of the witness, and being permitted to testify without objection on the part of plaintiff in error it is too late to raise that objection in this court.

Plaintiff in error objected to all testimony offered by defendant in error on the subject of due care on the part of defendant in error's intestate, on the ground that the declaration did not allege the exercise of due care on the part of the driver of the machine or on the part of the parents of said intestate, and that, thereby, such offer was at variance from the allegations in the declaration. We have carefully examined all of the authorities cited by plaintiff in error in that behalf and can not agree with the contention. It is true that it is held in **Ohnesorge. Admr, v. Chicago City Ry. Co.** 259 Ill. 424

and in **Ill. C. R. R. Co. v. Warriner**, 229 Ill. 91, that in a case of injury, causing death, to a minor child, an action brought for the benefit of those who were chargeable with its care, their contributory negligence will bar the action and that in this case the negligence, if there was such, of Lewis K. Pearl and Margaret Pearl, his wfe, parents of the deceased, would bar the action. But it is held in I. C. R. R. Co. v. Warriner, **supra,** on page 97: "It is urged that neither of the counts submitted to the jury stated a cause of action for the reason that they did not allege that the parents of the child were in the exercise of reasonable care for his safety. They allege that it was by and through the negligence and improper conduct of the defendant and the great and unlawful speed of the train that the deceased was struck and injured. It is fairly inferable from the allegations of those counts that the accident was not due to negligence or want of care of the parents of the child, and the issue joined under the plea of not guilty was such as necessarily required proof of the omitted fact. The defect was cured by verdict."

Plaintiff in error contends that counts 4 and 7 do not make a charge of willful and wanton injury, and we are

inclined to agree with plaintiff in error in this contention based upon the holdings; Jeneary vs. C. & I. Traction Co. 306 Ill. 392; **Chicago & Eastern Ill. .R R. Co. v. Hedges,** (Ind) 7 N. E. 801; **Cyc. Vol. 29, 574; I. C. R. R. Co. v. O'Connor,** 189 Ill. 557; **Burns v. C. & A. Ry. Co. and Enochs vs. Trevett,** Appellate Court, Third District of Ill. Oct. Term 1922. Nevertheless, over the objection of plaintiff in error the court permitted the defendant in error to argue to the jury, as though a willful and wanton injury was one of the issues in this case. Counsel stated to the jury: "This is where the rairoad company went down willfully and came up wildest through Alvin 60 miles an hour, slid through there and killed this innocent

little girl and her little sister," and other remarks of counsel to the jury which could only have been made, based upon a willful and wanton injury, which was not in the case. That the train of plaintiff in error was running at a high rate of speed, at the time and place in question, and that said train was running in violation of the village ordinance under the circumstances as alleged in the declaration and as shown by the proof, does not of itself amount to a willful or wanton injury. **I. C. R. R. Co. v. Hetherington,** 83 Ill. 510; **Blanchard v. L. S. & M. S. Ry. Co.** 126 Ill. 416; **Henning Brewing Co. v. A. T. & S. F. Ry. Co.** 150 Ill. App. 514; **I. C. R. R. Co. v. Eicher,** 202 Ill. 563.

The declaration in this case charged no more than negligence.

Plaintiff in error contends that defendant's intestate and the parents of said child were not in the exercise of ordinary care or any care for the safety of the deceased, as the said automobile was driven towards and over said crossing, at the time of said injury.

Alvin is a small village in Vermilion County with a little over 300 population. Plaintiff in error has a double track system that runs north and south through Alvin. The Illinois Central tracks runs east and west across plaintiff in error's tracks one block north of the crossing where the accident occurred. The depot of plaintiff in error is at the northeast intersection of where the two railroads cross. At the southwest intersection of said railroad crossings, defendant in error, Lewis K. Pearl, had a hotel

and store building where he with his family had lived for nearly a year. Defendant in error's lot ran through to the street south near the crossing in question and on the south side of said lot, situated

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about 140 feet west from plaintiff in error's tracks, was the garage of defendant in error. There were some buildings on the east side of defendant in error's lot south of the hotel or on the right of way of plaintiff in error. Railroad street ran along the south line of defendant in error's lot and crossed plaintiff in error's tracks where the accident occurred. The store building and hotel of defendant in error fronted to the east on plaintiff in error's right of way and along the east side of the hotel and south of the part used as a store was a porch of which the east edge came right up to the plaintiff in error's right of way. The south side of the hotel was about 60 feet north of Railroad street. There was an oil house, measuring 7 feet by 10, and 8 feet high, on the roalroad right of way just north of Railroad street. At the north line of Railroad street it was 51 feet from the center line of the southbound main track to the west right of way line of plaintiff in error, and it was 10.6 feet from the center line of the southbound main track to the east side of the oil house, and it was 29.4 feet from the west side of the oil house to the west right of way line. There was a plank crossing on West Railroad street across the south main track 16 feet wide. The crossing from the street to the tracks was on a grade, the natural surface being a foot lower than the railroad tracks. There may have been some other building south of defendant in error's hotel, but actual measurements were taken as to the openings from Railroad street looking north on plantiff in error's tracks. It was shown that from a point on West Railroad street, taking the center line of the street and going east, to determine how far one could see a train approaching from the north on the southbound track, and how far one could see along the track at the west right of way line looking north, a person

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could see 1089 feet. From a point 45 feet west of the center line of the main track one

could see 1700 feet north and at 40 feet west from such center one could see 1974 feet. At 35 feet west from such center one could see 2009 feet and the same distance from 30 feet west of the center of the south main track. At 25 feet west, the oil house obstructed the view. At the east side of the oil house or 10 feet out from the track one could see north on the track 1829 feet. The distance between the two rails of the tracks was 4 feet 8½ inches and the distance of the northbound track and southbound track from center to center was 13 feet.

The defendant in error took his machine out from his garage, 140 feet west on Railroad street from the crossing and the two daughters were seated in the hear seat, the defendant in error on the front left hand side, driving the car, and Margaret Pearl on the front seat to the right of the driver. Lewis K. Pearl, the administrator testified that as he drove east he was driving at a rate of 6 or 7 miles an hour. He states that he was busy with his car for a few moments and when within about 4 to 6 feet of the oil house he looked north; that after he looked north the tower was the only thing he saw; that he could not see through the tower; this tower is about 20 feet high and is a solid frame building. He states that he did not hear any bell ring nor any whistle blow. Lewis K. Pearl further testifies that when they started out of the garage with the car going east, the side curtains were on the car; these were rolled curtains and they were all down except the one where they got in and he thinks his wife rolled the last curtain down; there was a windshield in front and the car was entirely closed as they sat there in the car.

The evidence is very meager as to the exercise of care and

caution on the part of the parents of said deceased, and the only matter appearing in any of such testimony is the statement of Lewis K. Pearl that about four or six feet before he reached the oil house he looked north but saw nothing. It appears that various and numerous witnesses had had conversations with Lewis K. Pearl and Margaret Pearl, his wife, after the accident occurred, in which they had made various statements in regard to how the accident happened and plaintiff in er-

ror submitted impeaching questions to both Lewis K. Pearl and the mother, Margaret Pearl, as to such statements on cross examination, and the rulings of the court in this connection are complained of. For example plaintiff in error's witnesses, Bessie Allison, John Allison, Frank Smth, Clarence Franklin, P. M. Keith, Cora Malcom, I. M. Bowman and Rev. Wilber E. Keenan, attending the household, after the accident, as the family pastor, testified to statments made by Defendant in error, and his iwfe, that in approaching and going upon the tracks of Defendant in error they neither looked or listened for a train. It was necessary, therefore, in the admission of this testimony that the rulings of the court should be free from error. Louis K. Pearl had testified that when within four feet of the Oil House, he had looked north and in this statement he was corroborated by Margaret Pearl, at this point Defendant in error could see the tracks North 200 feet. Defendant in error had moved forward and was upon the tracks when his daugnter said to him:—"See Papa, there is the train." The train was 90 feet away. Impeaching questions, on cross examination were put to Defendant in error and Margaret Pearl, such as:—"Did you not say fixing time and place:—"I never, looked, nor listened, or even thought of the train coming until Louise said:—"Oh, Papa, there is the train." and again:—"I never looked for a train, I thought it had gone that is why I didn't look"—

and again:—

"It was my fault that our children were killed, I never thought a thing of the train until my daughter mentioned about the train coming." This was objected to only generally, and again:—"I didn't look for the train, I thougnt it had gone and the first I knew of the train coming,"—etc and objected to only generally.

Plaintiff in error offered the above named witnesses all of whom testified that defendant in error stated that he did not look or listen. Plaintiff in error offered to prove by said witnesses, the further statements made by Defendant in error, that he did not, think of the train,—thought it had gone, was the reason he did not look and other statements of substantive facts and not expressions of conclusions, charged to have been made by Defendant

in error, but the same were not admitted by the Court. Defendant in error made the offer, on its defense, to prove these statements, and called the attention of tne court to the fact that such statements were made by a party to the suit. The witness Frank Smith was asked by defendant in error to state conversations with the Plaintiff in error, as to the paticulars of how the accident occurred. This was objected to and sustained. The court further ruled as to showing these matters, as a substantive defense that:—"The only proper question you have a right to ask is the question which you put to the other witness," (Defendant in error.) In effect holding it was only competent as impeaching testimony and as contradicating some statement testified to by defendant in error, and again the court ruled, on the cross examination of Defendant in error, as to such impeaching questions, that they were only competent, "as to whether he did or did not look."

There was other testimony in the record corroborating plaintiff in errors defense of contributing negligence. We have only quoted excerpts to show the nature of the statements offered by plaintiff in error.

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In the opinion of this court, these statements offered, constituted substantive facts and should have been submitted to the Jury. The statement:—"I never thought of a train,"—is inconsestent with the statement of Defendant in error that he did look, (for a train?) what else should he look for. A statment of a condition of mind is the statement of a fact:—

Corpus Juris vol. 22 Page 297;

Central Ry. Co. vs. Allison 147 Ill. 471;

Pienta vs. Chicago City R. R. Co. 284 Ill. 246;

The court sustained an objection to a question put to Clarence Franklin, witness for plaintiff in error, whether Mr. Pearl didn't say:—"He didn't look for the train—thought it had gone." This by the rulings in Central Ry. Co. vs. Allison and Pienta vs. Chicago City R. R. Co.. supra was error. Even the statement—"I don't blame anybody I didn't look for the train, I thought it had gone," etc. This being a statement of mixed opinion and fact, when objected to only generally, is competent. The objection should be made specifically. Central Ry. Co. vs. Allison;

supra.

The rulings cited were so numerous and so many witnesses contradicted defendant in error in this matter that in the opinion of this court it constituted reversible error.

Plaintiff in error assigns error upon instructions given for defendant in error, and the court's rulings in refusing instructions submitted by plaintiff in error. Without going into all of said instructions, which would encumber this record to, too great length, it is the opinion of this court that it was error on the part of the court to refuse plaintiff in error's instruction 29 as to a wiliful and wanton injury.

Plaintiff in error also assigns error in the giving of certain nnstructions on behalf of refendant in error, based upon the variance between the declaration and the proof and based upon the

fact that defendant in error's declaration made no averment of the exercise of due and ordinary care on the part of defendant in error's intestate while approaching said crossing. As to this assignment of error covering both the question of instructions and the question of the sufficiency of the declaration under the evidence in this case, this count is of the opinion that a verdict found upon the issues as made, should cure such error.

For the reasons set out in this opinion the judgment and verdict of the lower court should be set aside and reversed, and the same is therefore hereby reversed and remanded.

Reversed and Remanded.

Heard J. While I do not dissent from the order reversing and remanding this case I do not concur in the reasons for such reversal assigned in the majority opinion.

(3/39 2)

General No. 7525 Agenda No. 30

October Term, A. D. 1922

L. F. Mostoller, Appellee

vs.

Illinois Rural Credit Association, a Corporation, Appellant

Appeal from McLean County Circuit Court.

SHURTLEFF, J.

290 I. 0744

This is an action in assumpsit by appellee, L. F. Mostoller, to recover $498.00 alleged to have been earned as salary for the performance of the duties of treasurer and secretary of the appellant corporation for the period April 1 to June 10, 1920, at the rate of $208.00 per month. Appellant filed a plea of setoff to recover $625.00 and interest paid to appellee, Mosteller, for his services as secretary and treasurer for the months of January, February and March, 1920. Appellee filed the common counts, and affidavit of claim and eight additional counts. The court sustained a demurrer to the original declaration and to the first, second, seventh and eighth additional counts, upon the ground that they had failed to aver that the corporation had authorized the payment of the salary sued for, in advance of the rendition of the alleged services. To the third, fourth, fifth and sixth additional counts appellant pleaded the general issue and there is no question raised upon this appeal as to the pleadings. A jury was waived, the court heard the evidence and entered judgment for appellee Mostoller in the sum of $479.16 and found against appellant upon its claim of setoff.

There are two questions raised, in this court, by this appeal. First, is appellant corporation liable to pay appellee the salary sued for; and second, is appellant entitled to recover the money already paid to appellee, Mostoller, for his services as secretary-treasurer for the months of January, February and March, 1920?

The Illinois Rural Credits Association is an active corporation organized in 1916 by appellee Mosteller, John J. Pitts, Frank Bunn and A. E. DeMange, for the purpose of making long time farm loans, of money acquired by the sale of its corporate bonds. The bonds are secured by mortgages acquired by means of private loans. The cor-

poration is entirely solvent. It sells its bonds through R. E. Wilsie & Company and the Central Trust Company of Chicago, and has a surplus of over $71,000 and has over $428,000 of loans outstanding. The rate of interest paid by its corporate bonds, is related directly to its earnnig capacity and the interest received upon its farm loans. During the war the sale of Government bonds and bonds of very high interest bearing securities issued by corporations needing money or making large profits in war work, temporarily deprived appellant of a market for its five and six per cent, bonds and necessarily limited its loaning and earning capacity for a temporary period. Prior to April 25, 1919, A. E. DeMange was president at a salary fixed at $5,000 per year; John Pitts Vice-president, at a salary fixed at $2,500 per year; Frank Bunn secretary, at a salary fixed at $2,500 per year, and appellee Mostoller, treasurer and appraiser, at a salary fixed at $2,500 per year. These four men had organized the appellant corporation.

In regard to the salaries of officers, on April 25, 1919,

the appellant corporation, either to reduce its expenses or to preserve intact its surplus, took certain action by resolution in regard to the salaries, the construction of which formed the basis of this suit. On April 20, 1917, by due and sufficient resolutions of the Board of Directors, the salaries of all the officers, which in effect constituted all of the stockholders of the company, were fixed as set out. We will cite the various resolutions passed by the Board of Directors affecting the payment of salaries.

On October 4, 1918, a resolution was adopted: "That in view of business conditions salaries of all officers, commencing December 1, 1918, be suspended except as to 33 1-3 per cent until further order of Board." On January 31, 1919, a resolution was adopted providing that the action of October 4, 1918, be rescinded and that commencing with January 1, 1919, all salaries of all officers be suspended until such time as the earnings of the Association justified the payment of a part or all of the monthly salaries.

On April 25, 1919, another resolution was passed

providing: "That all salaries except that of the bookkeeper cease from May 1, 1919, until such time as the earnings of the Association in the judgment of the Board of Directors, will justify the resumption."

As to the last resolution of April 25, 1919, appellant quotes some statements made by Mr. Bunn and Mr. Pitts upon an amendment offered to this resolution. In substance the statements were their views as to the liability to be affected or released against appellant company, but we do not deem such statements as any part of the resolution. The amendment was not adopted.

On September 17, 1919, the record recites: "Because of resignation of F. L. Bunn, Secretary, payment of his salary for the months of June, July and August authorized," and at this

meeting appellee, Mostoller, was elected Secretary-Treasurer to fill both offices inasmuch as Mr. Bunn had resigned, and a further resolution was passed at this meeting as follows: "Resolved further that the Secretary and Treasurer named in this resolution shall serve for one salary of $2,500 per year;

Resolved further, that the payment of salaries to any and all officers shall not be resumed until the further order of the Board."

At a further meeting on January 2, 1920, all members of the Board being present, a resolution was adopted as follows: "That the officers of the Association be paid for their services for the months of May, June, July, August, September, October, November and December, 1919, on the basis of the salaries heretofore fixed by Board of Directors." This resolution was unanimously adopted.

Again, on March 25, 1920, all members of the Board being present, a resolution was adopted as follows: "Resolution that in judgment of Board corporate earnings justify payment of compensation, to President, Secretary, Treasurer, and appraiser and Attorney, for their service for the months of January, February and March, 1920, and that such compensation be paid to them on the basis or at the rate per month fixed by the Board before salaries of officers were abolished until they should be resumed by resolution of the Board." This was unanimous-

ly adopted.

It would appear that thereafter on June 10, 1920, appellee, Mostoller, sold his stock in the company and ceased to act as secretary and treasurer of said company and disconnected himself from appellant corporation.

In the testimony of Witness Graff, who succeeded appellee as Secretary of the company, it appears that all of the officers who were officers between April 1, 1920, and June 10, 1920, had

been paid their salaries except the Secretary and Treasurer (appellee) and she testifies that there was evidently funds enough in the treasury to pay the salaries of the other officers for this period and that they were paid out of the funds belonging to the defendant available for that purpose at the time.

In the testimony of A. E. DeMange, who was tne President of the company, it appears that by resolutions of the Board of Directors after June 10, 1920, and prior to March, 1921, all of the salaries of officers of appellant except that of the Secretary and Treasurer, had been paid in full covering the period from April 1, 1920, to June 10, 1920, and it further appears by statements of the witness that the President refused to recommend the payment of the salary of the Secretary-Treasurer (apellee) because appellee had written certain letters and because of the conduct of appellee, as described by the witness in attempting to wreck the Association, and it appears by this record that while the salaries of all other officers were paid during the period, because of certain differences that had arisen among the officers of this Company and between appellee and the other officers, the Board of Directors refunsed to recommend or pay the salary of appellee.

A great many differences, in the opinion of t his court, immaterial to a decision of the issues have crept into the testimony and much of personality is injected into the evidence of certain witnesses and the arguments of counsel bordering upon the impertinent, to which this court refuses to give consideration and suggest to counsel that in cases of this kind the testimony of witnesses and the argument of counsel should be confined to the actual issues involved and that neither the maligning of

witnesses or their motives nor suggestion of personalities have anything to do with the legal issues involved in this case.

The corporation was evidently successful and profitable from the beginning. The authorized capital was twenty thousand shares of the par value of $50.00 per share, of which 200 shares were to be organization or voting stock, par value $50.00 each, and 19,800 shares were established as treasury stock with certain loan privileges, each share of treasury stock to be entitled to dividend at 5 per cent on par value in excess of any dividend declared upon shares of organization or voting stock. Organization stock only had the right to vote.

It further appears by testimony presented by appellant and urged in its reply brief, that the appellant corporation at the time of these differences had a surplus of $71,000 and in addition that the appellant corporation had an annual income of approximately $40,000 and that the payment of salaries authorized after the resolutions suspending payment of salaries in no manner affected the amount of the surplus.

The foundation of the Company was based upon the subscription of stock to the amount of $10,000 and its working capital in the beginning was $5,000 borrowed by the promoters from Mr. Pitts' bank, and there appears in evidence the organization agreement entered into between Pitts, Mostoller, Bunn and A. E. DeMange: "To organize corporation for the promotion and making of amortization loans on farm land." The agreement provides that A. E. DeMange shall be elected President, Pitts Vice-president, Bunn Secretary and Mostoller Treasurer of the proposed corporation, and that the several members will support each other and use influence and every legitimate effort to maintain the respective members in

the respective offices, and it appears that these officers and organizers with the possible exception of the successor to Mr. Bunn were during all of this time, the only interested stockholders in the concern and formed the Board of Directors. In other words, they were the only persons interested in the actual earnings and surplus of the Company.

We suggest this situation, not for the purpose of showing that the organization agreement was legal or binding upon appellant Company, but that in the opinion of this court such organization agreement and all of the facts and circumstances surrounding appellant Company should be taken into consideration, in construing their acts and resolutions and arriving at the purport of their intentions in their acts performed and resolutions adopted. In this case it is not a question arising between the creditors of a corporaton and the corporation, but, rather, the issues involved are differences between the organizers themselves and affect only the surplus and profits of the Company.

It appears that between the period of April 1 and June 10, 1920, appellee acted as Secretary and Treasurer and performed some services of a minor nature as appraiser in value of trifling importance and not important to a consideration of this case. Appellant contends that unless the record in this case shows that there was an existing by-law or resolution of appellant's Board of Directors in force prior to January 1, 1920, from which it can fairly and reasonably be inferred that appellant's directors intended to contract in advance that payment should be made appellee for his services during the period of January 1 to June 10, 1920, and unless it appears that appellee rendered services during such period in consideration of such contract, there can be no recovery of salary for the period April 1 to June 10, 1920, and that the

money paid for January, February and March, 1920, should be returned. This contention involves a construction of the various resolutions of the Board of Directors set out **supra,** and appellant's contention is that the effect of said resolutions and particularly the statements of Director Bunn and Director Pitts, in the meeting of April 25, 1919, in discussing an amendment to the resolution, which was not adopted, the substance of which statements was: "That the salaries already credited by the order of the Board constitute an obligation upon the Association and their payment will put all officers on the same basis as to the payment of salaries, and if they cease until the further action of the Board they will not

constitute a liability and by the adoption of this motion no debt will be created for officers' salaries, etc., give effect and work conclusions of law into the meaning and intent of the resolution which was adopted; and appellant contends that even though the construction of the resolutions effect a fixing of salaries, yet that the authorization for their payment, not having been provided for by the Board of Directors and in effect having been suspended. leaves no ground upon which appellee can found a liability against appellant company; and appellant contends that the only basis of the lower court's finding for appellee must be based upon the following conditions: (a) Solely because his salary was "fixed" in advance and other officers were afterwards compensated for their services during the period in question; or, (b) Because payment of his services was "authorized" in advance so that acceptance of the services by appellant created an existing liability to pay, subject only to the condition that the "time of payment" should be delayed until the corporate earnings justified it.

It is true that the law is that an officer of a corporation can not draw a salary from the corporation without a by-law or resolution authorizing and fixing such salary. **Ellis vs. Ward, 137 Ill. 509; Fritze vs. The Equitable B. & L. Society, 186 Ill. 200.** In the Ellis case there was no by-laws or resolution of any kind whatever fixing or authorizing any salary to be paid to the officer, and in the Fritze case the action was against a building and loan society, in regard to which, the law permitting such organizations to exist provided that no salary should be paid to any officer except the secretary where the contention was as to another officer; and it was held in **American Central R. R. Co. vs. Miles, 52 Ill.,** on page 179, that the law does not imply a promise on the part of railway companies to pay their directors for services as such, and it should appear that a by-law or a resolution of the Board had been adopted to compensate them for services before a director can recover; and the same rule was held in **Merrick vs. Peru Coal Co., 61 Ill. 472.** The last case, Merrick vs. Peru Coal Company, is of interest in that two brothers, Charles and George G. Merrick organized a coal company and that, inasmuch as the cor-

poration would require funds before the purchase was made in the first instance, in order to have money and credit to develop and carry on the enterprise, it was agreed that they were each to advance to the corporation the money for that purpose and as between themselves they would equalize the advances thus made. The meaning and effect of this arrangement gave rise to the controversy in that suit. Appellee contended that, under it, neither of the brothers could make the company liable nor could it become the debtor of either of them. On the other hand, appellant contended that, if the corporation would be compelled to borrow money to a considerable extent,

they would advance or loan to it the necessary funds in equal amounts, and as between themselves equalize that amount if one of them should advance more than the other. The court held that:—"If these brothers expected to make the stock of the company valuable, it was natural that they would be willing to loan means to the company from any surplus they had, look to it for repayment, and thus increase their interest in the property and profits of the company," and for that reason and others the court held that the arrangement must have been intended only to bind each to advance equal amounts to the corporation as loans and not as donations."

In Cheeney vs. L. B. & M. Ry. Co. the same general rule was laid down as to salaries of the officers of a corporation and quoting cases form other states, the reason of the rule is incorporated in the opinion of the court which is: "One holding a position of trust can not use it to promote his individual interest in any manner in disposing of the trust property; that the circumstances under which the bill was allowed was a fraud on the shareholders and to permit such a transaction to stand, would be a reproach to the administration of justice." The same case was before the court again in 87 Ill. page 446 in which the court states the rule: "The rule was there recognized to be that to entitle directors, etc., of such a company to receive compensation for services, it must be fixed by the board of directors of the company, or at least by a resolution of the directors, spread on the

minutes of their proceedings, and this before the services are rendered; and that if there was no such by-law or resolution, the duties plaintiff performed as a member of the executive committee in and about contracting for the con-

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struction of the road, including time and travel, were a part of his duty as director, and that he had no right to recover for them."

This case impresses this court with the idea that it is for a court, taking into consideration all of the acts and things performed by appellant corporation and its officers, to determine the meaning and intent of what was done, as the court was required to do in the Merrick case. It is not a case where the strict reason for the rule—and possible fraud upon stockholders—calls for even the strict enforcement of the letter and technical construction of the language used, but rather the circumstances in this case require a court to broadly interpret the purposes and intent of the various resolutions adopted by appellant's Board of Directors; and to do this, all of their actions and conduct and the surrounding circumstances should be taken into consideration.

It is fair to suggest at the outset that appellant's offset to recover payments of salary made between January 1, 1920, and April 1 of the same year, could as well have included the further payments of salary made to appellee under the resolution of the Board of Directors of January 2, 1920, covering the salary from May 1, 1919, to and including the month of December of that year. Why the salary for those months is not also included in the offset this court can not understand.

Calling attention to parctically the first substantial action taken to suspend salaries on October 4, 1918, the language of the resolution is that in view of business conditions salaries of all officers commencing December 1, 1918, be suspended. The salaries and the amounts thereof had been fixed by resolution of

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the Board. Their payment had also been authorized by proper resolutions. The resolution of October 4, 1918, merely authorized their suspension and the further resolution of January

31, 1919, uses the language: "All salaries be suspended until such time as the earnings of the Association justified the payment of a part or all of the monthly salaries." This does not in any manner abrogate the "fixing" of the salaries, neither does it abrogate the authorization of the payment thereof,—**in the future, at some time when the earnings of the Association shall justify the payment, etc.** It appears that in April, 1919, these former salaries had been paid because: Mr. Pitts moved that all salaries except that of the book-keeper cease from April 1, 1919. The use of the word "cease" we conclude was meant and intended to mean the same as the word "suspend" in the former resolutions. Wny pass a resolution suspending salaries on April 25, 1919, to commence upon the following May first if the former resolutions were being acted upon?

But appellee bases his contention in this case upon the resolutions passed Setpember 17, 1919, at which time appellee was made both Secretary and Treasurer and the salary for such offices in one persons was then fixed at $2,500 per year and especially upon the resolution then passed: "Resolved further, that the payment of salaries to any and all officers shall not be resumed until the further order of the Board." This in effect fixed the salary of the Secretary-Treasurer by proper and sufficient resolution. In the opinion of this court this resolution sufficiently authorized the payment of the salary but in effect, by resolution, in regard to the time of pavment only, as the resolution only purports to affect the question of payment, provides that such payment shall not be resumed until the further order of the Board,

and properly interpreting this resolution in connection with the resolution of April 25, 1919, it would become the duty of the Board to make payment of such salary at the time, when the earnings of the Association in the judgment of the Board of Directors will justify the resumption of such payment. No other fair or reasonable construction can be given to this language and such construction of the resolutions was given to this language by the Board of Directors and all of the interested stockholders and organizers in this corporat-

ion on January 2, 1920, by authorizing the payment of salaries to all of the officers of the Association for eight months, commencing May 1, 1919, and ending December 31 of that year. And again on March 25 all of the directors and organizers and interested stockholders in this corporation construed their own language and their own resolutions, to exactly the same purport by authorizing the payment of the salaries for the months of January, February and March 1920, at the same rate per month as the resolution states: "Fixed by the Board before salaries of officers were abolished until they should be recommended by resolution of the Board," which language under all the circumstances we construe to mean, before it was resolved to suspend payment of salaries until payment should be resumed by resolution of the Board. If appellant as a corporation objects to this construction of its own acts, it can only be replied that it is the construction of its own officers and the construction of all of its officers, directors and interested stockholders and organizers and acted upon by all of them, and they have each and all received and accepted the salaries upon this construction of their resolutions and as appellee contends in this court, that the payment of this compensation out of the profits of appellant had no effect whatever upon the $71,000 surplus of the corporation. No

creditor is interested in this construction or injured by these payments of compensation. No stockholder is interested or has suffered by such construction and the only reason why appellee was not paid his compensation as fixed by the Board and as shown by the evidence was because of certain differences that arose among these organizers.

A great many findings of law and fact were submitted to the court below by appellant and appellee as to various phases of this case, technical and otherwise, all of which were refused by the court, and to cite even a part of them would extend this opinion to too great a length and serve no useful purpose. The court below made a finding of facts on its own behalf and made a finding of its conclusions of law on the court's behalf substantially as found in this opinion. This court is sat-

isfied with such rulings and with the findings as found by the lower court and finds no error in the conclusions of fact or law as found by the lower court and in the opinion of this court the judgment of the lower court should be affirmed.

Judgment affirmed.

On Petition for Rehearing:

Appellant contends that the word "cease" in the Resolutions of April 25, 1919, had the effect to cut off all salaries,and to render the authority for such salaries void. At the meeting of Septeber 17, 1919, the new office of Secretary-Treasurer was established and the salary fixed at $2500,00 per annum. It was provided that said officer "shall serve for one salary of $2500 per year," but resolved further, that the payment of salaries to any and all officers shall not be resumed until the further order of the Board." Such payment of salaries was resumed on January 2, 1920, and again on March 25, 1920, and the actions of September 17, 1919, and of January 2d and March 25, 1920, were sufficient, not only to fix the salary and create the employment and liability, but to authorize the payment, even if appellant's contention is correct, although from all the transactions of this Company, both before and after April 25, 1920, we prefer to give to the word "cease" the construction appellant itself placed upon its use.

Rehearing Denied.

General No. 7535. Agenda No. 39.

October Term, A. D. 1922

Albert Mueller, Executor of the Will of Henry Chapino, Deceased, Appellant,

vs.

Dora Barcus, Appellee.

Appeal from the Circuit Court of Macoupin County.

SHURTLEFF, J.

Appellant as executor, filed his bill to the Circuit Court of Macoupin County to construe the terms and provisions of the last will of Henry Chapino, deceased. The first clause of said will gave to his nephew Albert Mueller all of his property, real as well as personal, but subject to certain conditions and only two of those conditions are involved in the bill in this cause. The second clause of the will concerning the duties of Albert Mueller as executor, with respect to the real estate, is in this language; "that he shall annually act for and pay over to my late wife, Christiene Chapino, for and during her natural life, and so long as her own property will not sustain her—the income, rents or profits arising from the rental of the following described premises, to-wit: The East half of the Northeast quarter of Section number 25, Town number 10 North, Range number 8 west of the Third Principal Meridian, after the payment of taxes and necessary repairs only." The third clause concerns the same land and this clause is as follows; "that he shall annually act for and pay over to Dora Barcus, wife of Dr. J. M. Barcus, as long as she remains his wife or his widow, and during and for her natural life—the income,

rents or profits resulting from the rental of the following described premises, to-wit: The Northeast quarter of Section number 25, Town number 10 North, Range number 8 west of the Third Principal Meridian, after the payment of taxes thereon and the necessary repairs only." It will be noticed that the third clause describes the quarter section of land of which the lands in the second clause formed a part. It appears that in 1893, after the death of the testator, a partition was filed

in the County Court of Macoupin County, by the executor, to which appellee was made a party, and a hearing had upon which a decree of the County Court was entered, requiring the executor to pay to Christiene Chapino, the widow of the testator, the rents and profits from the East half of said quarter section, and finding that the property of Christiene Chapino, the widow, was not sufficient for her support, and that all parties to said proceeding, as well as appellant and appellee in this case, recognized said order and decree and have carried out the same voluntarily during the life of Christiene Chapino.

Christiene Chapino died in the year 1920, and upon her death appellee demanded of the executor, that he should pay to her the rents from the whole quarter section of land, as described in the third clause of the will, upon which demand being made appellant filed the bill in this cause asking for a construction of said will and contending that the appellee is not entitled to any part of the rents, issues and profits from the East half of said quarter section that were granted to the widow, Christiene Chapino, under the second clause of said will, but that the same, under the first clause of said will, now belong to and are the property of said appellant, Albert Mueller, and insisting that the appellee is only entitled to the rents and profits during her lifetime of the West half of said quarter section.

Appellee filed an answer to said bill of complaint, claiming and demanding the rents and profits to the entire quarter section, under the third clause of said will, but answering that it was the mutual desire of the appellee, joining with the appellant, to have a construction of said will. A decree was entered in the court below, granting to appellee the rents, issues and profits of the entire quarter section during the lifetime of appellee, under the third clause of said will, and the case is brought to this court by appeal on the part of appellant, complainant below.

It is contended by appellant that there is an ambiguity in said will; that if the second and third clauses of said will had described seperate tracts of land there would be no ambiguity, but that, inasmuch as they des-

cribed the same tract of land, there is an ambiguity, and appellant consents and contends that all of the provisions of the will must be given affect, if it is possible.

Appellee contends that where a later clause in a will is repugnant to a former provision, the latter clause, being the last expression of the testator's intention, must prevail and must be considered as intended to abrogate or modify the former. **Glass v. Johnson,** 297 Ill., 149. This is the law, but it is not clear that it is necessary to apply that principal in this case.

The first clause of the will gave the property to appellant, Albert Mueller, but made the devise subject to the provisions of the second and third clauses in the will. Clause two grants the income, rents or profits from the East half of the quarter section to the widow, Christiene Chapino, upon condition; and the condition of such grant or life estate is; "in case her own property will not sustain her." It is to be gathered from the terms

of said will that the widow, Christiene Chapino, was the owner of certain property. She was an insane person and a patient in one of our state institutions. The testator had in mind in his will her care and support: "First, out of her own property," which, at the time of making said will, the testator was not certain would be sufficient for her support, and, therefore, he provided in the second clause of his will that if the property of his wife should not be sufficient for her support, then she was to take the rents, issues and profits from the East half of said quarter section of land.

The third clause of the will grants all of the rents, issues and profits of the entire section to appellee, and it is to be gathered from the terms of said will, and the whole will, that it was the intention of the testator that appellee should have all of the rents, issues and profits from said quarter section, but such devise was subject to the condition in clause number 2, as set out, and upon that condition arising clause number three was not to operate fully and completely as to the rents of the East half of said quarter section during any of the lifetime of the widow, while her own property would not support her.

Construing the whole will together, it is clear that

the third clause of the will was and is operative according to the language of the clause, subject only to the condition, and it is only a condition, as set out in the second clause of the will; and the third clause of the will is to be read and construed, the same as though the conditions in clause two were written into clause three. Appellant and appellee have, each of them, so construed the will by the proceeding in the County Court of Macoupin County in 1893, in which court appellant filed his petition to secure a direction

in carrying out the terms of said will, and in which court it was determined that the property of Christiene Chapino was not sufficient for her support, to which direction, order or decree of court, both parties to this suit gave their consent and followed during the lifetime of Christiene Chapino. Neither of the parties here, at that time or in this suit, questioned the jurisdiction of the County Court to make such order, and it may be construed, in the conduct of the appellant and appellee, as having full force and effect.

Taking all of the terms of said will as set out in the bill of complaint, we see no ambiguity or inconsistency between Clauses two and three. The condition having arisen, during the lifetime of the widow that her own property was not sufficient for her support, entitled the widow to such portion of the rents, issues and profits of the East half of said quarter section as would, with her own property, maintain and support her. If it had not required all of said rents during the lifetime of the widow, the remaining portion under the third clause of the will would have become the property of the appellee. The widow, Christiene Chapino, having died, the third clause of the will becomes operative as to the entire quarter section, and in the opinion of this court the construction given, to said clauses and the terms of said will, was correct.

The decree, therefore, of the Circuit Court of Macoupin County should be affirmed and is hereby affirmed.

General No. 7540 Agenda No. 42

October Term, A. D. 1922

George A. Kizer and John T. Reynolds, co-partners doing business under the firm name and style of the Kizer-Renyolds Motor Company, Appellants

vs.

C. H. Harwood, Appellee

Appeal from Circuit Court Coles County.

SHURTLEFF, J.

Appellants filed a bill of complaint November 2, 1921, to reform and modify a contract entered into between appellants and appellee on October 17, 1920. The written contract effected a sale of a Marmon automobile for $5300.00 by appellants to appellee, over which there had been negotiations for two or three months, said contract containing the covenant that: "In case of any reduction in price by the manufacturer of such cars prior to July 2, 1921 the purchaser should be reimbursed the difference between the price paid, $5300, and the new price."

Appellants are co-partners and the negotiations had been carried on between appellee and appellant Kizer until shortly before the date of the contract, when appellant Kizer left Mattoon, their place of business, to go upon his vacation. The negotiations were pursued between appellant, Reynolds, and appellee, who persisted in securing a guaranty, on reduction of price until July 2, 1921, in case of purchase, and appellant Reynolds refused to date such guaranty later than May 2, 1921, and Reynolds showed appellee a telegram, from the manufacturer, indicating that May 2, 1921, was the latest date to which the manufacturer could consent to stand back of a guaranty of reduction in price. It is charged in the

bill that the appellee represented and stated to Reynolds, that appellant Kizer, before leaving Mattoon, had promised to and agreed with appellee, to give a guaranty, as to reduction in price, up to and including July 2, 1921, and that appellant Reynolds believed said statement made by appellee to be true and relied upon the same, and so included said covenant, in the contract,

and that the statement of appellee was false and untrue and that Kizer never made any such promise or agreement. The contract upon being signed by appellee and by Reynolds for appellants, was placed on a tray upon appellant Kizer's desk, and the consideration for the car, which included certain liberty bonds and a $2000 note, were placed in a safe, in appellant's office, and in the early part of November following came into the hands of and were cashed at the bank, by appellant Kizer, upon his return to Mattoon. On May 2, 1921, and on July 2nd following, the price of these cars had been reduced by the manufacturer $1015.00. Appellee, having purchased the car under the contract, and paid the purchase price, after July 2, 1921, made a demand upon appellants for the reduction and upon their refusal to pay, brought his suit to the October Term of the Coles County Circuit Court to recover the damages, under the covenant. The bill charges that appellee refused to purchase said car, without a guaranty on price until July 2, 1921, and that appellants refused to make such a guaranty and date it later than May 2, 1921; the making of the false, fraudulent and untrue statements on the part of appellee and the lack of knowledge on the part of appellant Reynolds, and his reliance upon the statements of appellee, as set out. The bill prayed for an injunction and by the original bill, prayed a correction and reformation of said written contract, to change the date in said covenant from July 2,

to May 2, 1921. Later, by amendment, the bill prayed to strike out the entire clause and covenant, as to a "guaranty of reduction in price" from the contract. The bill further prayed that the appellee be enjoined from prosecuting his suit at law. Appellee answered the bill. There was a replication and a hearing before the chancellor. Appellant Kizer testified that he never knew anything about the covenant in the contract until appellee made his demand in July, 1921, and appellant Reynolds testified that he never knew the falsity of appellee's statements, until such demand was made.

There was much testimony introduced by both parties, touching the allegations and issues in this cause.

The chancellor heard all of the witnesses and testimony and upon a consideration of the same found that the bill was without equity and it was dismissed. Appellants have brought the record to this court by appeal.

Appellee has argued the case on the theory that complainants in the bill, asked to rescind a contract or a part of a contract, and that complainants, appellants herein, can only rescind by placing the appellee **in statu quo** and returning to the appellee the proceeds of the purchase received by appellants; but this is not a bill to rescind a contract or to rescind a purchase or a part of a purchase of any material or thing, but it is a bill to reform or modify the terms of a particular and specific contract, and in the view of the appellants the clause of guaranty is an independent covenant severable from the other terms of the contract, and the contract may be reformed and modified by striking such clause from the contract.

The appellants, being partners, are agents for each other and

either member of the partnership has authority to make contracts and covenants within the scope of their particular business, and each of the partners is chargeable with the knowledge of the other. Where a partnership firm receives money paid by a third person under a contract and gets the benefit of the contract, all the partners ratify the contract. **Kemp v. Miller,** 46 Ill. App. 214; **Porter v. Curry,** 50 Ill. 319, 320; **Wiley v. Stewart,** 122 Ill. 545; **30 Cyc, 488; 2 Corpus Juris, 493.** This rule is applicable even where one partner does not actually know of the material facts of the transaction, because it is his duty, before accepting benefits, to avail himself of the means of information within his control. **Richardson v. Lester,** 83 Ill. 55; **Wiley v. Stewart,** 122 Ill. 545. In **30 Cyc, 477,** it is held that "in every such partnership each member is an agent of the firm and of his other partners for the purpose of the business of the firm" and the knowledge of the agent is the knowledge of the principal.

In this case Kizer is chargeable with notice of the terms of this contract at the time the same was made. As a matter of fact, he had actual notice in the early

part of November, 1920, upon his return to Mattoon and cashing the note and bonds. Whether the actual contract came to his attention is a matter of no great importance. It was placed on his desk. It was made by his partner or agent, Reynolds. Kizer is chargeable with all the knowledge that Reynolds had in regard to this transaction.

Appellants contend that the courts of this state have held that upon bills to reform contracts, specific clauses or words may be expunged or cancelled from the agreement if reduced to writing, citing **Dinwiddie v. Self,** 145 Ill. 290-303; **Deischer v. Price** 148 Ill. 383; **Keeley v. Sayles,** 217 Ill. 589; **Ross v. Harbin,**

49 Ill. App. 192; **Bank of Antigo v. Union Trust Co.** 149 Ill. 347. A careful analysis of all cases cited will show that, in each one of them, the suit to reform the contract was based upon a state of facts, where the parties had arrived, in their negotiations, to a settled ageement,—their minds had met, as to what the contract, bargain or agreement should be—and then, in the operation of putting that bargaining and agreement into writing, the writing expressed something different or contrary from what the actual agreement was, and, in such cases, courts of equity will reform contracts. It was well said in **Keeley v. Sayles, supra;** "Counsel for appellants says that one, who seeks to rescind a contract or deed must put or offer to put the other party **in statu quo.** It was unnecessary here for Sayles to offer to pay anything to Keeley or Kinsella because they were entitled to receive nothing, as no part of the consideration paid included or had reference to the larger tract. The doctrine, that a vendor, who seeks the aid of a court of equity to rescind a contract of sale, must restore, or offer to restore, the cash payment that has been made, has no application here, because no cash payment was made for the larger tract." In this case, Keeley v. Sayles, land had been sold and the vendor and vendee had agreed to sell and to purchase respectively. In the making of the deed a larger tract was conveyed than was intended to be conveyed by the contract made. In such cases, courts will reform contracts and in all cases, wherein by mistake,

accident or fraud, something different, foreign or contrary to the actual contract made by the parties, has been permitted to enter into the written agreement, courts of equity will reform and modify, to make tne writing truly express the agreement of the parties.

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Appellants argue that the guaranty clause in this contract is an independent covenant, separable from the purchasing of the Marmon car and that, therefore, a court of equity has the authority to strike it out of tne contract. The Supreme Court of this State in **Bank of Antigo v. Union Trust Co.** 149 Ill. 343, and in other cases, has defined independent covenants and separable agreements. The court says in **Bank of Antigo v. Union Trust Co., supra,** page 348, quoting Parsons: "If the part to be performed by one party consists of several distinct and separate items, and the price to be paid by the otner is apportioned to each item to be performed, or is left to be implied by law, such a contract will generally be held to be severable." In this case, if the purchase of the Marmon car could be separated from the consideration of $5300.00, and could be said to be an independent purchase, based upon one consideration, and the guaranty on reduction based upon a different consideration, it might be argued that there was an independent covenant, but possibly what we shall say later in this opinion will fully cover that point.

It is also contended by appellee that this bill and the prayer are in effect a partial recission of the contract, and that appellants can not rescind unless they rescind the entire contract and then restore, or offer to restore, appellee to his former condition, quoting **3 Williston on Contracts,** par. 1529, page 2719; **Rigdon v. Walcott,** 141 Ill. 659-661; **Farwell v. Hanchett,** 120 Ill. 573-577; **Fisher v. Burke,** 285 Ill. 290-295; **Bell v. Anderson,** 292 Ill. 605-613; **Smith v. Brittenham,** 98 Ill. 188-197; **Smith v. Brittenham,** 109 Ill. 540-543; **Doane v. Lockwood,** 115 Ill. 495-497. There is no doubt about the authority of the cases cited by appellee in a proper case. In the view this court takes of this

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case, such authorities do not apply to the facts presented either by the bill of

complaint or by the proof.

The law as applicable to this case is, first:—a party is not allowed to speculate as to the benefits of the contracts and then, when he finds it will harm him to have it enforced, deny it. **Connett v. The City of Chicago,** 114 Ill. 233-240; **National Fire Ins. Co. v. Lumber Co.** 217 Ill. 98-105. In **National Fire Ins. Co. v. Lumber Co.** certain policies of insurance were issued by plaintiff in error to the defendant in error lumber company, based upon a verbal order sent to S. F. Requa & Sons, who were in the insurance business in the City of Chicago, to send defendant in error—"Some insurance on the east side," and S. F. Requa & Sons, not being able to furnish all the insurance, applied to agents, representing the complainant insurance companies in Chicago, for insurance on the property of defendant in error lumber company in accordance with the order, and the insurance policies in controversy were issued by said insurance companies, respectively. The property covered by said insurance policies was described in all of said policies as being "on lumber," *** all contained in their yard, *** situated on the east side of Ashland Avenue extending north from the west branch of the south branch of the Chicago River, Chicago, Illinois. On the 6th day of October, 1905, and while the policies, sought to be reformed, were in force, a fire occurred in the mill of said lumber company in its yard "situated on the east side of Ashland Avenue, extending north from the west branch of the south branch of the Chicago River, Chicago, Illinois," and a large amount of lumber belonging to defendant in error of the character, covered by said insurance policies, respectively, was destroyed. The defendant made proof of loss but said insurance companies declined to pay said loss on

the ground that, when they issued said insurance policies, they did not intend to insure any property of the lumber company situated south of an open strip 65 feet wide, which runs east and west across said lumber yard immediately north of the mill, although they admitted that the description found in said insurance policies, respectively, covered the property destroyed. They claimed all property described in said policies which

was contained in the mill or situated in the yard south of said open strip,, was included in said insurance policies, respectively, by mistake and it appears that defendant in error. lumber company, had brought suits to recover upon such insurance policies and bill was filed by plaintiffs in error to reform said contracts. The court say, page 105: "The policies were issued several months before the fire occurred and during the time that intervened, between their issuance and the time of the fire, copies thereof were in the possession of the insurance companies and said insurance companies were bound to know what provisions policies, issued by them, contained and what property they covered, and if they were honestly mistaken as to the property which the policies covered, they should have discovered such mistakes and then moved promptly for a correction of the policies, and not waited until after the property covered by the policies had been destroyed by fire, before filing their bill for a reformation of said policies."

In this case appellants were in possession of the written contract of appellee from the 20th of October, 1920, for a full year before any action was taken, on their part, to reform this contract. If it be true that the clause in question, guaranteeing a reduction of the price, was inserted in said contract by the appellant Reynolds, relying upon the statements of appellee, and

that such statements were false and fraudulent on the part of appellee, the opportunity was at hand, immediately upon appellant Kizer's return, a few days later, to inquire into the true facts, and appellants were in possession, at least in the early part of November, 1920, of all the facts and circumstances set out in their bill of complaint, at which time it was their duty, if such statements made by appellee were false and untrue, to move at once either to reform their contract or to rescind said sale, at which time appellee might have been placed **in statu quo** and appellants recovered their machine with slight loss or damage to either party. This they did not do, but waited until after the 2d of July, 1921, and speculated upon the chance of there being any reduction in the sale price of such machines. Appellants

can not speculate upon a contract of this kind or a covenant contained in the contract, whether such covenant was induced by mistake, accident or fraud, and await the outcome of loss or profit in such a situation, and after the loss has occurred, then apply to a court of equity to reform the contract. Appellants are in no different situation than the plaintiffs in error, in **National Fire Ins. Co. v. Lumber Co.,** and under the law and the facts in this case, appellants are chargeable with a full knowledge of the falsity of any statements claimed to have been made by appellee, at least in the early part of November, 1920.

Second: it is the opinion of this court that even if all of the facts and allegations set out in the bill or complaint are true, yet, such allegations do not entitle appellants to relief as prayed for in this case. 34 Cyc. 909; **Keeley v. Sayles,** 217 Ill. 589; **Wiemer v. Himmel,** 200 Ill. 374; **National Fire Ins. Co. v. Lumber Co.** 235 Ill. 98; **Queen Ins.**

Co. v. Spry Lumber Co. 138 Ill. App. 625; **Steinmeyer v. Schroeppel, 226 Ill. 9.** A court of equity, either for mistake, accident or fraud, will not reform a contract, except to correct some contract, which has actually been entered into between the parties. In other words, courts of equity under the term of reforming a contract, will not make contracts for parties which have not been entered into by the parties. In this case the very foundation of appellants equity, by their bill or complaint, if they have any equity, is that the decree will fix and determine, by reformation or modification, the actual terms of some contract, that has been entered into between appellants and appellee.

Under the terms of the bill, can it be said that appellants and appellee ever entered into an agreement for the sale and purchase of the Marmon car, with no guaranty clause for reduction in price at any future time? Appellants were ready to guarantee a reduction, if the manufacturers made such, on or before the 2d day of May, 1921. But it is not alleged in the bill that appellee ever agreed to purchase the car with such a guaranty of reduction to apply to May 2, 1921. Neither is it averred in the bill that appellee ever agreed to pur-

chase the car with no guaranty of reduction, so that if a court of equity grants the relief prayed for in appellant's bill, then a court of equity is fixing and determining that a contract exists made by appellee, which appellee never made. To meet this situation appellants contend in their brief: "Harwood (appellee) was informed early in the negotiations that he couldn't get a price guaranty to July 2, and the fact that he kept on with the negotiations after he was so informed, justifies the conclusions that he intended to buy the Marmon car, with that guaranty if he could get it, but buy it, in any event." In other words, appellants insist that a court

of equity should determine that if appellee had not made the contract as written, then that he would have made some other kind of a contract, which he did not make. It is not the function of a court of equity to make contracts for suitors which they have not entered into. As was said in **Steinmeyer v. Schroeppel, supra** the court concluded that the minds of the parties never, in fact, met, because the bidder fell into the error without his fault. *** "No agreement was, in fact, made, since the statement of the price by the seller was clearly a mistake," and so the court held: "If equity would relieve on account of such a mistake, there would be no stability in contracts, and we think the Appellate Court was right in concluding that the mistake was not of such a character as to entitle appellants to the relief prayed."

It was held in **Queen Ins. Co. v. Spry Lumber Co.** (same case as **National Fire Ins. Co. v. Lumber Co. supra)** 138 Ill. App. page 625: "These alleged mistakes and misrepresentations were not discovered nor was a rectification attempted, while the parties might, by the return of the premiums on the one hand and a surrender of the policies on the other, have been placed **in statu quo,** but after a fire has destroyed the property insured and no such re-establishment of former condition is possible, the power of the court sitting in chancery is invoked in name, to reform and in effect to rescind the contracts. *** Moreover, the attempt seems to us not to be inaptly described in the words which the appellants have quoted in their reply brief from an opinion

of the Circuit Court of Appeals in the Eighth Circuit in another case: "In form, this is a suit in equity to reform written contracts. **In fact, it is a bald attempt to supersede written agreements with the parol negotiations which preceded and induced them."**

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The law as it applies to the reformation of contracts is well laid down in Cyc. Vol. 34 at page 909: "As a ground for reformation, such mistake of fact exists when the parties under some erroneous conviction of law or fact include within the written evidence of the agreement something which should not be there, or omit from such instrument something which should be there, or so express their agreement that it sets forth something different from what was intended, all of which they would not have done but for the erroneous conviction; **but the agreement itself in all cases should be a definite agreement."**

Not only by this authority but by the authority of all the cases cited and by the elementary rule of equity, there can be no reformation of a contract unless there be a definite agreement, with the reform or modification as made. In this case with the contract of guaranty stricken out of the written agreement, appellants will not contend that appellee ever entered into any contract whatever of that nature. Appellee did not buy the Marmon car without the guaranty of reduction. With the clause or covenant of "guaranty of reduction" stricken out of the contract in this case, then under either, the allegations in the bill of complaint or the facts as proven, no contract was ever entered into between appellants and appellee, which a court of equity could reform, and appellants bill of complaint, upon its face, does not set out any equity whatever, in appellants.

It is useless to discuss the law of rescission of contracts, because in the bill of complaint in this case, appellants have not

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undertaken to rescind, neither have they performed any of the acts which would warrant appellants in rescinding. It is also useless to discuss the question of this clause of guaranty being an independent or separable contract or covenant, because this clause

or covenant in the contract was a necessary inducement, as shown by the bill and the evidence, which determined appellee to enter into the contract.

There is no equity in appellant's bill of complaint and the decree of the lower court should be affirmed.

Affirmed.

General No. 7548 Agenda No. 63

October Term, A. D. 1922

Illinois Corrugated Metal Company, Appellant

vs.

Commissioner of Highways of Tremont Township, Appellee

Appeal from the Circuit Court of Tazewell County.

SHURTLEFF, J.

This is a suit in assumpsit brought by the appellant against the Commissioner of Highways of Tremont Township in Tazewell County, appellee, to recover the price of metal culverts sold by appellant to appellee. The declaration consists of the common counts.

Appellee filed the general issue and plea of payment upon which issues were joned. The plea of payment avers payment to the plaintiff on June 11, 1919, and by appellee's affidavit of merits it was stated that payment was made for the goods received from appellant to A. W. O'Brien, agent of appellant.

There was a trial by jury, a verdict for appellee and judgment on the verdict, from which the appellant has appealed.

Appellant was a manufacturer or jobber of various road material, with its office and place of business at Springfield, in this State. Appellee was the Highway Commissioner of Tremont Township. The business of appellant was selling road material to the various township commissioners through the central part of the State. The particular transactions in question were carried out on behalf of appellant by A. W. O'Brien, a sales agent, and plaintiff proved in the court below, the orders or requisitions by the Commissioner, for

the purchase of certain articles in the year 1918, the bill of lading and delivery of the goods, the claim being for two purchases in the months of October and November, 1918. Appellee, to show payment, offered certain documents dated, commencing, in the early part of 1918 and ending with June 11, 1919, which were admitted in evidence, over the objection of appellant, and which tended to show, that various purchases had been made by appellee from appellant

through the agent O'Brien, prior to the purchase of the items in question, in which orders had been given to O'Brien and payment thereafter made by the issuing of an order or warrant, of the Town of Tremont, upon the teasurer of said Township, payable to the order of the Illinois Corrugated Metal Company and signed by the Highway Commissioner for said Town, pursuant to the statute, containing on the reverse side of each, itemized account of the bill and charges, an affidavit signed and sworn to by O'Brien, and the endorsement of said A. W. O'Brien upon such warrants; whereupon, the warrants were presented to the Tremont National Bank, which had been used as a depository of the township funds, and upon the receipt of such warrants, so endorsed, the Tremont National Bank had issued drafts payable to the Illinois Corrugated Metal Company and turned said drafts over to the agent O'Brien and which were, by O'Brien, forwarded to appellant company. The record shows that none of said warrants, although payable to the order of appellant, were ever presented to or endorsed by the appellant, but were endorsed by the agent, A. W. O'Brien. Appellee presented two warrants which were admitted in evidence, over objection of appellant, covering the items in question. Some objection is made that the bill of particulars, on the back of the warrants, does not specifically describe the items of goods purchased, but the amounts are identical and the dates are identical and it is

shown by both appellant and appellee that there were no other shipments or purchases unpaid or in difference between these parties, so that, it is the opinion of this court, there is no question in dispute as to identity of goods.

The testimony shows that on the 11th day of June, 1919, the agent, A. W. O'Brien, came to Tremont, having been sent there by appellant to urge payment or remittance for these unpaid items, and presented the bills to the Highway Commissioner. Said bills or statements are drafted, "The Town of Tremont, Fund General, to A. W. O'Brien Debtor." The testimony of the Commissioner is that the Agent O'Brien requested him to draft the order payable to A. W. O'Brien to facilitate the getting of the funds into the hands of appellant, and the orders were so drawn, and upon O'Brien's endorsement of said orders the

same were paid by the Tremont Bank, in cash, to O'Brien. Appellant shows that O'Brien never turned the money over to appellant; that the bills have never been paid and insists that O'Brien had no authority to collect these bills; that he was merely a sales agent and with authority only to urge settlements, and it is shown by the requisition orders for these goods, over the signature of the Highway Commissioner, at one side, however, and in small type: "Notice: Your check in settlement must be made payable to Illinois Corrugated Metal Company. Send it direct to Springfield by mail. Pay no money to agents without our written order," and appellant insists that such notice was on all statements of claim, requisitions and notices sent out by appellant. Such statement appears upon the exhibits in evidence. The Commissioner testifies that he never saw that statement on any of these papers until after the issuing of the two warrants on June 11, 1919. It is shown by the evidence that O'Brien left the employ of appellant, but remained, living at Springfield,

in this State, and was living there at the time of the trial of the case, but that appellant had never requested O'Brien to pay these moneys to the appellant at any time and had made no demand upon him, but had always looked, even after appellant knew of the issuing of these orders, to the appellee for payment.

Upon each of the orders issued June 11, based upon statements showing an indebtedness, is a statement that the items in the annexed account are just and true and the articles were furnished and services rendered as therein charged, and that the amount is due and unpaid after allowing all just credits, which statements is signed by A. W. O'Brien and sworn to by him before E. L. Riley, the town clerk of Tremont township.

In this case apellant is chargeable with knowledge of all the provisions of law, providing for the expenditure and payment of township moneys. At the time of these transactions the Township Supervisor was the treasurer of the Township Road and Bridge fund. Section 50 of the Road and Bridge Act provided, as to the powers of the highway commissioner: "4. To direct the expenditure of all moneys collected in the town or road district for road and bridge purposes, and to draw warrants on

the town or district treasurer therefor."

"Section 52. The treasurer of the road and bridge fund shall receive and have charge of all moneys raised in the town or district for the support and maintenance of roads and bridges therein. * * * hold such moneys at all times subject to the Commissioner of Highways, and shall pay them over upon the order of not less than two of them and not otherwise. He shall keep an account in a book provided by the Commissioners of all moneys received and all moneys paid out, showing in detail to whom and on what account the same is paid."

Prior to June 11th all orders issued by appellee, in this course of dealing, had been made payable to appellant, the Illinois Corrugated Metal Company, but there is no claim that said orders were ever in the hands of the appellant or of any person for appellant, other than the said A. W. O'Brien; that said orders were endorsed by A. W. O'Brien; sometimes in the name of the "Illinois Corrugated Metal Comapny by A. W. O'Brien" and presented to the Tremont National Bank, whereupon drafts were issued payable to the Illinois Corrugated Metal Company.

The general manager of appellant company testified that O'Brien was the agent of the Illinois Corrugated Metal Company; that he was their salesman; that from May 1, 1918, to September 1, 1919, no other agent than A. W. O'Brien, of appellant company, had any dealings with Tremont Township; that the Company received the drafts as forwarded by A. W. O'Brien from the Tremont National Bank.

Wallace testified that the Agent O'Brien, prior to June 11, 1919, was handed these statements of account against Tremont township and requested to see the Highway Commissioner. In one statement Wallace says: "I know he was furnished statements of accounts that were owing the Company and requested to call on the Township Commissioners and ask them to send in their remittances to the Company and try to make the collection." In another answer the witness says: "Yes, sir he was asked to see Mr. Plattner to try and get the money, get the remittance." Plattner was the Highway Commissioner of Tremont Township.

Whether an agent is clothed with apparent authority to perform an act, which will bind his principal, is a question of fact to be determined by the jury upon consideration of all the facts and circumstances proved. **Phoenix Ins. Co. v. Stock,** 149 Ill. 319, 336; **Nash et al v. Classon,** 163 Ill. 414.

Where a principal has by his voluntary act placed an agent in such a position that a person of ordinary prudence, conversant

with business usages and the nature of the particular business, is justified in presuming that such agent has authority to perform a particular act and therefore deals with the agent, the principal is estopped as against such third person from denying the agents authority, 21 R. C. L. 907; **Faber-Musser Co. v. William E. Dee Clay Mfg. Co.** 291 Ill. 240.

Where an agent selling articles for a company is permitted to transact business on behalf of the company, with the knowledge of its controlling representatives, in such manner that he is held out as an agent with general power, the purchaser will be protected in subsequent payments made to him. The **Howe Machine Co. v. Ballweg,** 89 Ill. 318.

The principal is equally bound by the authority which he actuacally gives and by that which, by his own acts, he appears to give. The principal is responsible for the appearance of authority. **James v. Conklin & Hill,** 158 Ill. App. 640, 644; **Nash v. Classon,** 163 Ill. 419.

In order to prove an agency the defendant was bound to prove an appointment, either express or implied from the circumstances. **Schmidt v. Shaver,** 196 Ill. 106, 116. The law indulges in no presumption that an agency evists. **Schmidt v. Shaver, supra.** Where one sustaining business relations with an agent maintains that such agent had apparent or implied authority to bind his principal, he must prove affirmatively that the facts giving color of authority to the agent, were known to him at the time of the transactions in question. **Paper Mfg. Co. v. Bank,** 199 Ill. 151.

The course of dealing between the parties and all the circumstances, in relation thereto, were competent on the question of the agent's apparent authority to col-

lect. **Faber-Musser Co. v. Dee Mfg. Co.** supra; **Fruit Growers State Bank v. Peters,** 181 Ill. App. 432;

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Hass Lumber Co. v. Hardy Bros. 169 Ill. App. 323.

Regardless of the notice which Plattner, the Highway Commissioner, testifies he never saw, until after June 11, 1919, it appears that, in five different transactions between the appellant and appellee, prior to the claimed payment of this order, appellant, with knowledge, had given O'Brien the authority to collect. In other words, O'Brien had authority to endorse the township orders at the Tremont National Bank and to secure settlements thereon. The Tremont National Bank was not the treasurer of Tremont Township and nothing appears in this record to show any presentation of these orders to the supervisor or treasurer of Tremont Township. The fund was kept in the Tremont National Bank for convenience. It is true that, in each of the five prior cases, drafts were secured and forwarded to appellant, made payable to the order of appellant, but upon receiving each draft the appellant had full notice that its agent, O'Brien, had assumed authority, if it had not been granted him, to endorse township orders payable to the order of appellant. Appellant had accepted such settlements in each case, based upon the agent O'Brien's endorsement on the township orders. Appellant was chargeable with notice that, when it permitted O'Brien to endorse its orders and secure payment for the same, even though in the five cases he secured payment by a bank draft payable to appellant's order, such authority, is authority to endorse and collect at the agent's discretion. In other words, appellant permitted its agent, A. W. O'brien, to endorse and collect. In the five prior cases appellant's agent endorsed, collected and remitted. June 11, 1919, as to the two orders in question, the agent not only endorsed but had the orders made in his own name and failed to remit. It is the opinion of this court that the authority im-

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plied or not objected to, to the agent to endorse and collect, is an implied authority to collect generally. Appellant was chargeable with notice,

in dealing with townships or Highway Commissioners, that its bill could only be paid, to appellant, by a township order, payable to the order of appellant, the same to be endorsed by the appellant or some one having authority, under appellant, to endorse such order, and appellant, during all of this dealing, permitted its agent, A. W. O'Brien, to endorse its orders and forward a bank draft to it, in place of the original order. The authority to endorse the order was authority to collect.

In addition, the testimony of Wallace shows that the agent O'Brien was sent to Tremont to try and get the money, get the remittance, and when previous orders had been given to O'Brien, they had been endorsed by O'Brien at the Tremont Bank. Plattner testifies that: "When the first order was given to O'Brien, I went to the Bank and identified him; it (the order) went to the regular course of the Bank; it got back to my possession again; it was cashed there." Appellee had a right to rely upon this course of dealing; **Jackson Paper Co. v. Com. Bank,** 199 Ill. 158; **Rawson v. Curtiss,** 19 id. 456; **Maxey v. Heckethorn,** 44 id. 437.

Under all the facts and circumstances of this case, we can not say but that there was evidence submitted to the jury by appellee showing that the agent, A. W. O'Brien, had authority, to effect a settlement of this account and collect the money.

In **Faber-Musser Co. v. Dee Clay Co. supra,** the court say on page 246: "While it is true, as argued by appellee, the declarations of an agent are of themselves incompetent to prove agency; they are admissible against the principal to show the extent of his authority as such agent, and this includes also written statements by the agent contained on letters or letter-heads or receipts.

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(2 Corpus Juris 939.) But it is also true that the fact of agency or the nature or extent of authority may be established by parol evidence. Circumstantial evidence is ordinarily competent to establish the fact or extent of agency. (2 Corpus Juris, 944). In case of doubt as to the extent of the agency and the authority of the agent to bind the principal, 'reference may be had to the situation of the parties and property,—usages of the country on such subjects, the acts of parties themselves,

and any other circumstances having a legal bearing and throwing light on the question.' (21 R. C. L. 882.)"

Appellant objects because, while the witness Wallace general manager of appellant company, was on the witness stand and it was shown that the agent O'Brien had been paid for these claims and was still living in the city of Springfield and neither side had inquired as to the dealings between appellant and said agent or made any inquiry as to these particular funds, belonging to appellant, that the court directed certain questions to the witness inquiring if any demand had ever been made on O'Brien for the funds, and his place of residence, etc. It is charged that this inquiry on the part of the court prejudiced the jury. The questions tended to elicit information, facts and circumstances, having a bearing upon the issue of O'Brien authority to make the collection, and facts and circumstances, which were competent and which it was proper, for the jury to consider, in determining the issues before them, and we can not see how either party, much less appellant by the answers given, could have been prejudiced.

Appellant objects to certain modifications made in instructions offered by appellant. Instruction number one based upon the notice in the requisition and other papers,—not to pay money to agents,—the court modified by inserting: "or by its conduct and

dealing with O'Brien waived notice as to payment to agents." The instruction was a peremptory instruction, to find a verdict for plaintiff. We think under the evidence the instruction as modified was correct.

Appellant objects to a modification to instruction number three and instruction number four on account of a similar insertion and insists, in its reply brief, that the objection is made to the modification because there was no evidence upon which to base such instruction. What we have said fully covers that point.

Appellant contends that the giving of appellee's instruction number seven was error. This instruction stated that "an agent must act within the scope of his authority to bind his principal, nevertheless in determining the extent of his authority in this case you may rely up-

on the conduct and acts of all the parties, in evidence, which were known to each of them prior to the 11th day of June, 1919, and if you find from the evidence in this case that the Illinois Corrugated Metal Company sent A. W. O'Brien out and gave him the bill or statement against the defendant in this case and authorized him to collect the same, and that he made the collection thereof, as set up in defendant's plea, then, in that state of the proof your verdict should be for the defendant."

The basis of the objection is that the instruction authorizes the jury to determine the question of law as to what conduct and acts of the parties determine the agent's authority and submits that it is a question of law and not a question for the jury to determine. This objection is based upon a statement of the court in **Faber-Musser Co. v. Dee Clay Co. supra,** page 247: "Whether an agent has express authority to do a certain thing is a question of fact for the jury, but whether an implied authority arises from a certain state of facts is a question of law which should not be submitted to the jury by an instruction. **Doggett v. Green,**

254 Ill. 134." Referring to the Doggett case the court held, page 139: "There was no evidence tending to prove that Dr. Green had any express authority from his father to employ a broker and authority to fix a price would not preclude his making a sale himself, without the aid of a broker," and in that case the court held that it was error to submit the question to the jury whether or not the agent, Dr. Green, had implied authority to employ a broker. We do not think instruction number seven is subject to the criticisms made by appellant. The jury are instructed that the agent must act within the scope of his authority in this case—meaning his express authority. They may rely upon the conduct and acts of the parties, etc. There was some evidence of Wallace, that O'Brien had express authority to collect. There was evidence that O'Brien had actually collected in all the matters between the parties to this suit prior to June 11, 1919. We think the purport of the instruction was merely to inform the jury that they had the right to take into consideration the course of dealing and the circumstances to determine

what actual authority O'Brien had.

Finding no reversible error in this record, the judgment of the lower court should be affirmed, and it is hereby affirmed.

Affirmed.

General No. 7565. Agenda No. 11.

April Term, A. D. 1923.

Carl H. Elshoff, Appellee,

vs.

Thomas F. Murray, Appellant.

Appeal from the Circuit Court of Sangamon County.

SHURTLEFF, J.

Appellant, Defendant, appeals from the granting of a preliminary order of injunction. The injunction order was issued out of the Circuit Court of Sangamon County, without notice, on January 25th, 1923. On the third day of February 1923 certain of the Defendants, including appellant, filed a motion to dissolve the injunction and upon February 10th and order was entered in the Circuit Court modifying the injunctional order as to certain other Defendants, but the order was permitted to stand as to the Defendant Thomas F. Murray.

On the same day the appellant prayed an appeal from both orders—first from the order granting Appellee the preliminary injunction which was granted and issued on January 25th, 1923 and, second, from the order of February 10th, 1923 modifying, but refusing to dissolve the injunction. On February 16th, 1923 Appellant perfected his appeal, in the lower court but gave bond in the matter of the issuing of the preliminary injunction only, and did not appeal from the order modifying but refusing to dissolve the injunctional order. This bond given, and approved by the Court, effected the taking an appeal from the order granting the preliminary injunction made January 25th, 1923. The record was filed in this court on March 28th, 1923. Appellee moves to dismiss the appeal.

An order granting a preliminary injunction is merely interlocutory and is open to review only upon an appeal taken in the manner provided in the act to provide for appeals from interlocutory orders;

that is section 123 of the practice act:—Keeley Co. vs. Hargraves 236 Ill. 316. The identical question was considered in McCarthy vs. City of Chicago 197 Ill. App. Page 564. This case

contains an elaborate consideration of the entire subject of interlocutory appeals and the same conclusion is reached as in Schillo vs. Anderson 51. Ill. App. 403. In delivering the opinion of the Court in McCarthy vs. City of Chicago supra, Mr. Justice Pam said (p. 570) "Under the numerous decisions of this Court appellant's right of appeal is based entirely upon this section, which clearly provides that in order to appeal from such interlocutory order or decree, the appeal must be taken within thirty days from the entry of such interlocutory order or decree."

"The statute also provides that, in addition to the appeal being taken within thirty days, it must be perfected in the Appellate Court within sixty days from the entery of the interlocutory order or decree appealed from. This brings us to the question as to what is meant by the language "and is perfected in said Appellate Court within sixty days from the entry of such order of decree."

The court then referred to the contention of counsel for appellant that all that the statute required was that the appeal be taken in thirty days; that, if the appeal were taken within thirty days, all that was necessary for appellant to do was to file the transcript of record on or before the second day of the next succeeding term of the Appellate Court. The court proceeded to point out that while this was true with respect to appeals from final orders, which were goverened by other sections of the Practice Act, it had no application to interlocutory appeals, because such appeals were governed wholly by Section 123 of the Practice Act. In this connection the court said (p. 573) "That such is not the meaning of Section 123, is evident from the decisions which we have heretofore cited, wherein it was expressly held that when the statute provided that an appeal shall be taken within thirty days, it was meant that the bond, approved by the clerk of the lower court, must be filed within thirty days; hence, we must look for a different interpretation of such language and the only reasonable interpretation is, that there must be on file in the Appellate Court, within sixty days from the entry of the

order or decree appealed from, a transcript of the record of the proceeding, from which this

court can determine the correctness of the ruling of the court in issuing the interlocutory order complained of."

The court then pointed out the difference in the provisions of the statute governing appeals from final orders and those contained in Section 123 governing appeals from interlocutory orders. The court particularly noted that in the case of appeals from final orders, the appeal had to be prayed for and allowed by the trial court, and the bond approved by the trial judge, or under his order. This is not the case in interlocutory appeals, where the appeal is to be taken by merely filing a cost bond within thirty days, which is to be approved by the clerk. It was also there noted that the statute, with respect to the time of filing records in appeals from final orders, authorized the reviewing court to extend such time, upon application made before the expiration of the time fixed by statute, and said (p. 574.)

"However, there is no provision for any such contingency in Section 123. It expressly states in so many words, that the appeal must be taken within thirty days and perfected in the Appellate Court within sixty days. This entire section was intended to secure a quick and summary review of interlocutory orders or decrees.

Section 123 (J. & A. 866k) further provides:

"Upon filing of the record in the Appellate Court the same shall there be at once docketed, and shall be ready for hearing under the rules of said court, taking precedence of other causes in said court."

This language clearly confirms us in the view that the perfecting of the appeal means the filing of the record in the Appellate Court. In as much as the record in this case was not filed in this Court for more than sixty days after the granting of the preliminary injunction, this court is constrained to hold, the same as it was held in the McCarthy case, that it is without jurisdiction to permit any transcript to be filed upon such an appeal after the statutory period of sixty days has elapsed, and the motion of Appellee to dismiss the appeal in this case is granted and the appeal dismissed.

General No. 7531 Agenda No. 35

October Term, A. D. 1922

Frank B. Vennum, Appellee

vs.

Virgil W. Johnston, Appellant

HEARD, J.

This is an appeal from a judgment in an action of trover for $10,805.17 and costs in favor of appellee against appellant.

The declaration consisted of two counts, the first count alleging that appellee was the owner of a certain set of abstract books and the second count alleging that appellee was the owner of a half interest in said abstract books as tenant in common with appellant and each count alleges a conversion by appellant.

Appellee is the father-in-law of appellant. The evidence of their financial transactions with each other is very voluminous and no good purpose would be subserved by analyzing or discussing it in detail. Suffice it to say that in our opinion the manifest weight of the evidence shows that appellee was not the sole owner of the abstract books in question nor the owner of a half interest therein as tenant in common with appellant and the relation of the parties was either that of debtor and creditor or partners in a partnership which has not been dissolved and an account stated between the partners, in either of which events trover was not the proper remedy. If the relation was simply that of debtor and creditor the remedy lies in an action of assumpsit, or perhaps account, and if the relationship be that of partners, the remedy is by resort to a court of chancery.

The verdict of the Jury being so manifestly against the weight of the evidence as to show that the jury failed to comprehend the nature of the case the judgment of the circuit court is reversed and the cause remanded.

Shurtleff, J. Dissents.

General No. 7528 Agenda No. 33

October Term, A. D. 1922

Millard F. Dunlap, Appellant

vs.

Calvin Lawson, Appellee

Appeal from the Circuit Court of Morgan County.

SHURTLEFF, J.

Appellant, Dunlap, filed a bill for injunction in said cause to restrain the appellee from going upon the land and harvesting, a certain forty acres of growing wheat on one tract and ten acres, part of a separate farm, on another tract.

Appellant Dunlap was the owner in fee of both tracts, having secured title from his uncle, Samuel Dunlap, a good many years before, and the lands having been originally the property of appellant's grandfather, who was the father of said Samuel Dunlap. On the death of Stephen Dunlap, the grandfather, the real estate which he owned was sold for the purpose of paying the debts of his estate. Appellant and Samuel W. Dunlap at such sale purchased some 267 acres of the land, all of which was afterwards sold, except the forty acres described in the bill of complaint, which was deeded to Samuel W. Dunlap as his share of the profits of the transaction. Samuel W. Dunlap retained title to this forty acres of land until the year 1907, when he conveyed the same by warranty deed to appellant. The remainder of the real estate which composed the farm of 150 acres, was held by the widow of said Stephen Dunlap as her homestead and dower until her death. There was a large number of claims which had been allowed and which were unpaid and continued as judgments against the estate of Stephen Dunlap, and after the death of his widow,

Dicey Dunlap, such claims became liens upon the real estate held by her as homestead and dower. Samuel W. Dunlap had obtained title to this 110 acres from all of the heirs of Stephen Dunlap except the interest

of Stephen Dunlap, Jr., and the interest of Irvin Dunlap, which had before that time been sold on execution and the title was vested in the Jacksonville National Bank. Some of these old claims were being pressed for settlement. Samuel W. Dunlap had no means with which to protect the real estate in question. He obtained a deed from Stephen Dunlap, Jr., for the latter's interest and the appellant agreed with said Samuel W. Dunlap that he, appellant, would take care of the claims which were pressing for settlement, among which was the interest of the Jacksonville National Bank, obtained from Irvin Dunlap, on the express condition that Samuel W. Dunlap should have the right to occupy the 110 acres by keeping the same in repair, paying the taxes and paying appellant six per cent interest on whatever amount of money it should require to protect the title. This arrangement was carried out and on May 4, 1912, Samuel Dunlap conveyed to Millard F. Dunlap, appellant, the 110 acres of land referred to and appellant paid off the existing claims to an amount between twelve and thirteen thousand dollars.

At the time the forty acres above referred to was conveyed to appellant by Samuel W. Dunlap on April 27, 1907, appellant agreed with said Samuel W. Dunlap that he could have the use of the same at a rental of $200.00 per year. The conveyance of the forty acres of land was to settle indebtedness which Samuel W. Dunlap was owing to the bank of Dunlap, Russell & Company and the consideration was $6,000, which still left an indebtedness of something like $3,500, which appellant took over from the bank and still holds.

As to the 110 acres of land, the lands of the elder Stephen Dunlap, when the conveyance of these lands was made to appellant, it was with the understanding and agreement that the appellant should keep the land as long as he, appellant, and his uncle, Samuel Dunlap, should live and that the said Samuel Dunlap could stay upon the lands and manage the place and farm it by keeping up the improvements and paying the taxes, and

that whatever amount of money appellant had invested in this property the said Samuel Dunlap should pay appellant at the rate of six per cent per annum. That was to be paid annually and for use and occupation of the lands. As to the forty acres, it would appear that upon the conveyance being made to appellant there was simply a verbal agreement made that his uncle Samuel Dunlap should have the use of said lands from year to year at a rental of $200.00 per year.

While this was the situation of affairs, in the fall of 1919 Samuel W. Dunlap plowed the forty acre tract of land and sowed the same to wheat and also plowed ten acres of the old farm and sowed that to wheat, before any notice of any kind was served upon him to cancel the tenancy.

In the month of December, 1919, after the crop of winter wheat had been sown upon this land, appellant served notice upon his uncle Samuel Dunlap, cancelling the lease or year to year tenancy on the 110 acres of land, the old farm, and notified Samuel Dunlap to vacate said premises on or before the first day of the following March. On the trial of the cause it was stipulated that as to the forty acres, outside of the old farm, the leasing in question was a leasing "from year to year at will",—the lease commencing on March 1, 1907. In the month of January, 1920, Samuel W. Dunlap, in writing, for a consideration of Six Hundred Dollars, sold and conveyed to Calvin Lawson, appellee in

this suit, all the right, title and interest to fifty acres of wheat planted and growing on farm which said Dunlap rented and operated in Township 15, North of Range 9, West of the Third Principal Meridian, in Morgan County, Illinois, said fifty acres being all of the growing wheat on the farm. The bill of sale or instrument further provided as part of the consideration that "if for any reason Dunlap should fail to pay the cash rent for said fifty acres, which cash rent amounts to $250.00 a year, the said Calvin Lawson will pay same to the proper person at the proper time in ac-

cordance with Lawson's habit of paying cash rent in the past." This was signed by Samuel W. Dunlap and delivered to appellee Lawson, and it does not appear that appellee had any notice at the time of any change in tenancy or that a notice had been served upon Samuel W. Dunlap to vacate the old farm which involved ten acres of the land sowed to wheat.

On March 1, 1920, Samuel W. Dunlap had vacated the 110 acre "old farm," on which the ten acres of wheat was growing, in pursuance of the notice given by appellant, and a writ of restitution issued in a Forcible Entry and Detainer proceeding, brought by appellant, and the said Samuel W. Dunlap also, at the same time, of his own volition, abandoned and vacated the 40 acres, and, on his part, cancelled the year to year tenancy thereon, whereupon, the appellant entered into the possession of both tracts.

On or about the first day of July, 1920, Lawson, appellee, having stated and threatened that under his bill of sale he was going to enter upon the land and cut and harvest the wheat, appellant filed his bill of complaint, secured a temporary writ of injunction and prayed that the same might be made perpetual

against appellee Lawson

to prevent the threatened trespass.

A motion was made by appellee to dissolve the temporary injunction, which was overruled.

The cause was heard before a master in chancery, who returned the evidence into court, finding the facts substantially as herein set out.

The Master further found: that on July 3, 1920, Samuel W. Dunlap was in arrears of rent for said 110 acre tract in an amount in excess of the value of said wheat; and the Master further found that one-fourth of the wheat in question was raised upon the ten acres of the 110 acre tract and that about ten acres of the wheat on the forty acre tract had been drowned out.

The Master further found that approximately 600 bushels of wheat was harvested from said crop and mar-

keted at a gross price of $2.45 per bushel, and it was noted that the evidence did not show the expense of harvesting.

It was further found by the Master that the wheat in question was sown by Samuel W. Dunlap in the fall of 1919, and that on December 23, 1919, Samuel W. Dunlap was served with notice to quit and deliver possession to appellant of the 110 acre tract in question.

The Master further found that on the third day of July, 1920, the appellee, Lawson, was threatening to enter upon said real estate and harvest said wheat and take the same to his own use, and the conclusion of the Master was that the said Samuel W. Dunlap when he vacated and abandoned said premises, forfeited all his rights in and to said crop of wheat and that the appellee, Lawson, took no right or claim to said crop under the bill of sale and found the issues for the complainant and recommended that the injunction be made perpetual.

Objections to these findings were filed and argued before

the Master and overruled by the Master, and later these objections were made exceptions before the chancellor. The chancellor sustained all of the exceptions and entered a decree dissolving the injunction insofar as the crops upon the forty acres in question were involved, inasmuch as appellant had served no notice to cancel the year to year tenancy upon said tract, but sustained the injunction as to the crops raised upon the ten acres of the old farm. The court, by its decree, found that the wheat raised upon the said ten acres was one-fourth of all the wheat in question and that the value thereof was much less than the rent due upon said 110 acre tract and awarded the entire possession thereof to apepllant. Out of the proceeds of the balance of tne wheat raised upon the forty acres the Court, by its decree, provided that: first, all the costs of this proceeding should be paid and that thereafter appellant shoulo be paid $400.00 for the rent of said forty acres of land for the two years 1919 and 1920, during which the said

crop was grown, it appearing that no rent had been paid upon said forty acres of land since March 1, 1917.

The Court, by its decree, denied the motion of appellee to assess damages upon the dissolution of the injunction as to the crops on the forty acres of land and awarded the balance of the proceeds of said wheat, after the payments aforesaid, to be turned over to appellee, Lawson.

From this decree both appellant and appellee prayed an appeal to this court, which was allowed and assignments of error have been made by both appellant and appellee to the findings of the chancellor below.

It is the contention of appellant that the cancellation of the tenancy worked a forfeiture of all crops growing upon the

land on the first day of March, 1920, and that the cross bill filed by appellee, setting out the bill of sale and asking for the adjustment of the equities of appellee in and to the fund now in the hands of appellant as proceeds of said wheat be adjusted, is not germain to the matters set out in the original bill, and that the court in this proceeding has no jurisdiction to adjudicate upon questions presented by appellee's cross bill.

It is the contention of appellee that the court below erred in allowing appellant two years rental for said lands out of said fund, and that the court erred in providing that all of the costs should be paid out of said fund, and that it was error to allow or take into consideration out of the wheat grown upon the ten acres, part of the old farm, any of the rents of said land other than the accrued rents upon the ten acres which it would appear by the bill of sale, Samuel W. Dunlap had estimated at $5.00 per acre, amounting to $50.00.

The relationship between Samuel W. Dunlap and appellant was that of landlord and tenant. As to the forty acres it was a tenancy from year to year at will. As to the ten acres, part of the old farm, it was at least a tenancy from year to year at will, as found by the court below, with some aspects of being a tenancy for life upon

condition.

The crop sown and in the ground and in the course of maturity during this tenancy and before any notice was served as to the cancellation of the tenancy as to the ten acres at least, constituted personal property as between landlord and tenant. **Meinke v. Nelson,** 56 Ill. App. 269; **Powell v. Rich,** 41 Ill. 469; **Nuernberger v. Von Der Heidt,** 39 Ill. App. 404.

It is otherwise as between vendor and vendee. **Talbot v. Hill,** 68 Ill. 106; **Firebaugh v. Divan,** 207 Ill. 287, and in

such cases it is held that the growing crops pass with the deed unless reserved, but as between landlord and tenant the rule is elementary that such growing crops are personalty and the title thereof may pass by purchase and sale, even by parol.

It becomes important in this case to determine the right of tenant in leases from year to year at will to growing crops and emblements. In all cases of life tenancies and where the period of tenancy is indefinite and liable to be determined at any time, (other than by the act of the tenant) the tenant, his heirs and assigns, are entitled to the growing crops and to emblements, with the right of ingress and egress upon lands after the determination of the tenancy to properly cultivate and harvest said crop. We do not find any well considered case in the Illinois courts that is determinative of this question as it applies to a "tenancy from year to year at will." The denomination of such a tenancy we construe to be a tenancy from year to year with the privilige of either landlord or tenant to cancel such tenancy by notice under the statute at the end of any year.

The tenancy as to the ten acres of the old farm partakes of a different nature and has in it the elements of a life estate upon condition, but we do not consider the same important as to the decision of this case for reasons which will be hereafter stated.

This court in **Keays v. Blinn,** 137 Ill. App. at p. 474, had before it a case involving a life estate and on page

477 quoted Taylor on Landlord and Tenant, Sec. 534 as follows: "A tenant for life or his representative and under tenant, as well as a tenant from year to year, or at will, is entitled to emblements; which is a right to take and carry away after his tenancy is ended such annual productions of the soil as are raised by his

labor. This privilege is allowed to tenants for life, at will and from year to year because of the uncertain nature of their estates, and lest they should be deterred from the proper cultivation of their lands; and the general rule upon this subject is that if the term is so uncertain that the tenant at the time he sows his crop, can not know that this tenancy will continue until he shall have reaped it, he will be entitled to the crop as emblements." Our Supreme Court held in **Simpkins v. Rogers,** 15 Ill. 397: "Where a tenancy at will is determined by the lessor, the tenant is entitled to the emblements, and to a reasonable time for the removal of his family and property with free ingress and egress for the exercise of such rights."

In an earlier work of Taylor upon Landlord and Tenant (1844), it is held, p. 38, defining a tenancy from year to year, and the author says that it occurs,—"where lands or tenements are let to another without limiting any certain or determinative estate. This species of lease, where no certain time is mentioned, according to the strictness of the ancient law, continued during the pleasure of the parties only, and might be put an end to at any time by either party; the lessee in such case was called a "tenant at will." And further the author says, p. 39: "The lessor could not determine the estate after the tenant had sown, and which he had not reaped, so as to prevent the necessary egress and regress to take away the emblements." **But an entirely different rule is laid down where the tenancy is put an end to by the act of the tenant himself for if a tenant at will terminates his lease, by giving notice, or otherwise, he has no right to take away any of the productons of the land, after his tenancy ends.** Some light is thrown upon this by Blackstone. In Arch-

bold's Blackstone, Vol. 2, p. 143, the author says: "The second species

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of estates in freehold, are estates, at will. An estate at will is where lands and tenements are let by one man to another to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases but every estate at will is at the will of both parties, landlord and tenant; so that neither of them may determine his will and quit his connections with the other at his own pleasure. Yet this must be understood with some restriction. For, if the tenant at will sows his land, and the landlord before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free in gress, egress and regress, to cut and carry away the profits." And page 148: "An estate at sufferance, is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and, after the year has expired continues to hold the premises without any fresh leave from the owner of the estate. Or if a man maketh a lease at will, and dies, the estate at will is thereby determined; but if the tenant continueth possession, he is tenant at sufferance."

In **Thompson v. Baxter,** 21 L. R. A. New Series, 575, it was held that where a grant is made subject to be defeated by a particular event, and there is no limitation in point of time, it will be **ab initio** a grant of an estate for life as much as if no such event had been contemplated. "Thus, if a grant be made to a man so long as he shall inhabit a certain place, or to a woman during her widowhood, as there is no certainty that the estate will be terminated by the change of habitation or by the

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marriage,

respectively, of the lessee, the estate is as much an estate for life until the prescribed event takes place, as if

it had been so granted in express terms." 4 Kent's Com. 27; II Blackstone Com. 121; 16 Cyc. p. 614, and many other authorities.

It appears to this court that the tenancy of Samuel W. Dunlap as to the ten acres of the old farm was a tenancy for life, subject to being defeated by reason of a failure to carry out any of the conditions prescribed, and that the tenancy upon the forty acres was a tenancy from year to year or a tenancy from year to year at will, which in the opinion of the court would amount to substantially the same thing, and that the determination of said tenancies, or either of them, upon the will of the lessor while growing crops were in the ground and in the course of maturity, would entitle the lessee to emblements with the right of ingress, egress and regress to properly cultivate, harvest and secure said crops, and the abandonment of said premises by the lessee, without compulsion, would entitle the landlord to the growing crop.

Appellee urges that the chancellor erred in allowing appellant two years rent out of the proceeds of the wheat grown upon the forty acres, and insists that in any event the court should only have allowed appellant for one years rent out of the same. In the view that we take of this case, it does not become necessary to decide that question.

It was held in **Cheney v. Bonnell,** 58 Ill. 268, that where a landlord under a claim that a tenant has forfeited his lease by not performing its conditions enters upon the premises and harvests and sells a crop of wheat sowed by the tenants, the landlord fails to acquire title to the grain unless he can establish a forfeiture of the lease, and this case is followed in

Dobschetz, et al v. Holliday, 82 Ill. 374.

The evidence in this record is ample that Samuel Dunlap abandoned the forty acre tract of his own accord, voluntarily and thereby forfeited all interest and claim to the crops growing thereon, the right to which vested in the landlord, appellant.

Samuel W. Dunlap having sown these crops on the

fifty acres of land prior to any notice given to cancel the tenancy, was the owner of the crops and had the right to go upon said lands and cultivate, harvest and secure said crops. No notice was ever given to cancel the tenancy as to the forty acres, but these premises Samuel W. Dunlap abandoned voluntarily in March, 1920. After sowing the ten acre field to wheat a notice was served to cancel the tenancy as to said old farm upon the first day of March, 1920. Samuel W. Dunlap, being the tenant and having sown the crop, had the right to sell the same and turn it over to the appellee for a portion of the consideration shown in this case. This was not a subletting of the land nor a sublease as argued by counsel for appellant, but was a mere sale of the crop with the rights of the tenant to go upon the land and to cultivate and harvest the same and with the right of emblements in the tenant, including the right of ingress, egress and regress to cultivate, harvest and secure said crop. These rights did not destroy appellant's statutory lien for rent upon said crops, and this lien, insofar as appellant is concerned, for the 110 acres of which the ten acres of wheat formed a part, extended to all of the crops upon said 110 acres for the rent of the entire tract, and the wheat growing upon said ten acres forming a part of said tract was holding for the rent of the entire tract.

As to the crop growing upon the forty acres of land, Samuel W. Dunlap, by his voluntary abandonment of said tract, forfeited

his right to emblements therein and by such forfeiture, the crops growing thereon, passed to the owner and landlord, appellant, and as to such crops, Lawson's bill of sale became inoperative, and the appellant, in July, 1920, being the owner and in possession in equity, had the right, by injunction, to protect said property from the threatened trespass. Appellee Lawson's bill of sale covering the wheat growing upon the ten acres, was not void, but it was subject to all liens upon the crop, for rents due and owing for the entire farm of 110 acres, which rent and liens, were so much in excess of the value of the crop

that appellee's bill of sale of the crop was without value, and cannot afford basis of equity by a cross bill. The Court, having acquired jurisdiction of the original bill by virtue of appellant's ownership of the crop upon the forty acres, will extend its jurisdiction in this case to protect appellant's lien upon the crop raised upon the ten acres, where it is shown that appellant's claim and interest is of greater value than the crop. It follows that the decree of the lower court must be reversed and such decree is therefore reversed and the said cause is remanded, with directions to dismiss the cross bill of appellee for want of equity and to enter a decree in accordance with the prayer of the original bill.

Reversed and remanded with directions.

(3166)

General No. 7559 Agenda No. 6

April Term, A. D. 1923

G. S. Hardy, Edward Culbertson, Ora Bussart, A. J. Snedeker, Alex Snedeker, Charles Gardner, W. L. Green, G. E. Boyer, George W. Adams, William Bussart, Walter Gumm, Charles Gumm, J. A. Mattingly, Harry B. Adams, John A. Durnil, Travis Dodd, Jeff Martin, Paul C. Martin, W. W. Hodge, and Geo. W. Bristow, States Attorney in and for the County of Edgar, State of Illinois, Appellants

vs.

W. S. Jones, W. S. Jones as Supervisor of the Town of Buck, Charles Milam, Charles Milam as Commissioner of Highways of the Town of Buck, Frank Bertram, Frank Bertram as Town Clerk of the Town of Buck, William Laymon, John Davidson, Ben Castelle, Jas. Whitson, Ernest Evinger and G. V. Cline, Appellees

Appeal from Edgar.

PER CURIAM.

In this case a bill of equity was filed in the circuit court of Edgar county by the above named appellants as complainants, against the appellee as defendants, praying for a mandatory injunction. A temporary injunction was ordered by the master in chancery, and was issued. The court afterwards upon a hearing dissolved the temporary injunction; and upon a suggestion of damages filed, awarded the appellees an allowance of $300.00 solicitor's fees for services of their solicitors in procuring a dissolution of the temporary injunction. The bill was amended, and an answer filed, and a number of affidavits were filed on the motion to dissolve the injunction; and the court upon a final hearing, dismissed the bill for want of equity. An appeal was prayed from the decree dis-

solving the temporary injunction, and dismissing the bill for want of equity; this appeal is now pending.

The abstract filed in the case is so incomplete, that for the most part, it is a mere skelton of the pleadings proceedings and evidence, and the orders taken in the case. Rule 22 of this court requires that "the party bringing a cause into

this court shall furnish a complete abstract or abridgment of the record therein." It is the settled practice under this rule, under the circumstances here presented, to affirm the judgment or decree appealed from. Deterding v. Central Illinois Service Co. 223 Ill. App. 374.

The decree is therefore affirmed.

Affirmed.

Term No. 36. R. H. No. 1

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

OCTOBER TERM, A. D. 1922.

The People of the State of Illinois, ex rel. Florence E. Elam, Appellee, vs George Stanbery, Appellant.	Appeal from County Court Bond County, Illinois.

Opinion by Boggs, P. J.

On the 15th day of February 1921 a complaint was filed before a Justice of the Peace in Bond County, by one Florence E. Elam, charging that she is an unmarried woman and that on the 24th day of January 1921, she gave birth to a bastard child and that appellant is its father. A trial was had in the County Court resulting in a verdict finding appellant to be the father of said child. The motion for a new trial made by appellant was overruled and judgment was entered on the verdict in the form prescribed by statute. To reverse said judgment appellant prosecutes this appeal.

The record discloses that about March 20th, 1921, the prosecuting witness became a domestic servant in the home of Dr. A. R. Stanbery of Vandalia, Illinois. The Stanbery family consisted of the Doctor, his wife and appellant, a son. At that time the prosecuting witness was a woman of about twenty-one years of age and appellant, a student in the High School, was then some few months past seventeen years of age.

The prosecuting witness testified that a short time after she entered the employment of Dr. Stanbery, appellant made an indecent proposal to her and that she replied "that she was not that kind of a girl." That a short time thereafter appellant came home from high school early in the afternoon and went into his bed room; that she, the prosecuting witness was in the kitchen at the time, and that appellant called to her to come in his room; that she entered the room thinking that he wanted to know where his clothing was, and that appellant shut the door and had intercourse with her on the bed. She further testified that she missed her first menstrual period after said intercourse and that appellant gave her some medicine in tablet form which she took and that no results were derived therefrom. She further testified, that appellant afterward gave her a bottle of liquid medicine. The prosecutrix remained in the home of Dr. Stanbery until the 2nd day of October, 1920. On the other hand appellant testified that he never had intercourse with the prosecuting witness and that the occurrence testified to by her never took place. Dr. Stanbery and Mrs. Stanbery both testified that the prosecuting witness had a great many men coming to see her during the months of April and May. Dr. Stanbery testified that on one occasion they found her on the porch with a certain young man along about one o'clock in the morning and

that she was sitting on his lap. Certain other witnesses, school friends of appellant, testified to having seen the prosecuting witness in company with other young men and one or two of them testified to having seen her in a more or less compromising position. On rebuttal, the prosecuting witness denied having kept company with any of the persons named, except one young man, that she said she went to the show with on two or three occasions.

On direct examination the prosecuting witness testified that appellant directed her to go to Dr. Stanbery, his father, and say to him that "I got in bad" that she went to Dr. Stanbery as directed and that he said to her 'that it was the most dangerous time and for me to come back the fourth month' and I went back the fourth month and when I went back he did not help me. He told me 'to go to Dr. Tuckett in St. Louis;' and I went." This testimony was objected to and a motion was made by appellant to exclude the same, which motion was overruled. In view of appellee's testimony to the effect that appellant had directed her to go to Dr. Stanbery it was proper to show what she said she had been directed to say to him, but not what Dr. Stanbery said in reply; that part of the answer should have been stricken.

It was also insisted by counsel for appellant that the court erred in permitting the witness Miller to testify on rebuttal in contradiction of the testimony given by Mrs. Stanbery to the effect that he, Miller, had called on the prosecuting witness, the first time being about three weeks after she came to their house. It is the contention of appellant that the testimony of Mrs. Stanbery in reference thereto was brought out by counsel for appellee in his cross examination, and for that reason appellee could not on rebuttal offer evidence in contradiction thereof to impeach Mrs. Stanbery. An examination of the record discloses that appellant's point is well taken, but his abstract failed to disclose how said testimony got into the record. It is the duty of counsel preparing an abstract to so prepare the same that it will present the questions sought to be raised.

It is contended by appellant that the court erred in refusing to give the ninth instruction offered by him. We have examined this instruction and find that instructions No. 2 and No. 7 in practical effect cover the material matters set forth in refused instruction No. 9. The court therefore did not err in refusing to give the ninth instruction.

It is also contended by counsel for appellant that the court erred in instructing the jury as to the form of their verdict. That part of the instruction complained of is as follows: "If, the jury find from a preponderance of the evidence that George Stanbery is not the father of the bastard child born to Florence E. Elam, the form of your verdict may be: 'We, the jury find the defendant not guilty.' " This instruction is based on an incorrect theory and was calculated to mislead the jury in making up their verdict. In view of the fact that the evidence in the case is sharply conflicting, we hold that the giving of this instruction constitutes reversible error.

As has been repeatedly held by our Supreme and Appellate Courts, where the evidence is sharply conflicting, the instructions should be accurrate. Illinois Central Railroad Co. vs. Maffit, 67 Ill. 431; Holloway v. Johnson 129 Ill. 367; Lyons v. Ryerson & Son, 242 Ill. 409; Sibert v. Shoal Creek Coal Co. 181 Ill. App. 11.

For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported.

that she was sitting on his lap. Certain other witnesses, school friends of appellant, testified to having seen the prosecuting witness in company with other young men and one or two of them testified to having seen her in a more or less compromising position. On rebuttal, the prosecuting witness denied having kept company with any of the persons named, except one young man, that she said she went to the show with on two or three occasions.

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For the reasons above set forth the judgment of the trial court will be reversed and the cause will be remanded.

Reversed and remanded.

Not to be reported.

Term No. 36 Agenda No. 55.

In The
Appellate Court of Illinois,
Fourth District

March Term A. D. 1923.

Audra Cunningham, Appellee. vs. Clyde Cunningham, Appellant.	Appeal from Circuit Court of Wayne County.

Opinion by Boggs, P. J.

In August, 1921, appellee filed a bill for separate maintenance in the Circuit Court of Wayne County against appellant. The Bill charges among other things that "he was guilty of such extreme and repeated cruelty toward her as to render it unsafe and improper for her to live with him; and that appellant pursued a persistent, unjustifiable and wrong course of conduct toward appellee which necessarily rendered her life miserable and living with him as his wife unendurable; that because of such treatment she was compelled to and did separate from him on the 22nd day of June, 1921, and has lived separate and apart from him since that time without her fault. An answer was filed by appellant denying each and all of the allegations of cruelty and improper conduct and averring that appellee left him without any cause whatever and had refused to return to his home. Appellant further averred that he had always treated appellee kindly; had furnished her with the necessaries of life and that he was willing and ready to take her and their children back to his home and provide for them as a husband should provide for his wife and children.

The cause was heard by the Chancellor in open court at the January Term 1922, was taken under advisement and a decree was entered at the January Term 1923. To reverse said decree appellant prosecutes this appeal.

The evidence discloses said parties were married Nov. 8, 1917, and lived with appellant's father for something over a month; that thereafter appellant bought a three roomed cottage, furnished it and he and appellee moved into the same the latter part of December 1917. Appellant was a rural mail carrier prior to his marriage and continued in said employment until June 26, 1918, when he was inducted into the military service and in October following went over seas. He returned to the United States in January, 1919. Upon appellant's going into the army his wife took his place as mail carrier and continued in said employment for something like five months when she ceased the same on account of her pregnancy. A child was born to appellee on March 4. 1919. On February 12, 1919, appellant obtained a furlough and came home and stayed with his wife until March 8th after the child was born. He then returned to his command, but on the 12th of March he was discharged and came home and resumed his duties as mail carrier.

The record further discloses that Mrs. Meadows, the mother of appellee, lived with her daughter the greater part of the time while appellant was in the service. Mrs. Meadows came again to the home during the summer of 1920 and 1921. In all she had lived in the Cunningham home for about eighteen months. The record discloses that the second child was born to appellee on June 2, 1921.

The evidence in the case wholly fails to show any acts of cruelty unless it be said that appellant had required appellee to submit to excessive sexual intercourse. So far as the record discloses this only occurred during the period of one week in which appellee testified that appellant had had sexual intercourse with her for four successive nights and that on the fifth night she told him that her health would not permit of his having intercourse with her and that he became angry at her refusal. Excessive sexual intercourse will not amount to cruelty unless persisted in by the husband against the will of the wife and when he knows that the same is injurious to her bodily health. Young v. Young 33 App. 223. The record fails to show evidence of this character.

The only tetimony in the record with reference to misconduct on the part of appellant is confined to the testimony of appellee and her mother, and consisted of such things, as his standing before the mirror and primping, manicuring his nails; powdering when he shaved; shaving every day; blowing a bugle in the house and on the roof of the chicken house; refusing to let the baby sit in the automobile when he was washing it; going to work some mornings without telling her and the baby goodbye; refusing to let the baby sit in a chair for fear he would scratch it! wanting appellee to help grease the little chickens to kill the lice on them and requiring her to help pick lice off of them; not caring if appellee were pregnant and trying to get her in that condition; stopping at his father's and eating supper before coming home the day he arrived on his furlough, and matters of that character.

While several witnesses, neighbors of appellant and appellee were sworn and testified on behalf of appellee, none of said witnesses testified to the effect that appellant had ever in any way mistreated his wife. On the other hand appellant testified denying each of the charges made against him by appellee and her mother, except as to his having called appellee a vile name on the occasion when she refused him sexual intercourse, and he testified that he tried to keep appellee from leaving her home. Appellant further testified that he went to the home of her uncle where appellee was living on four different occasions and tried to persuade her to return home; that she refused to allow him to hold the children and while she did not say she would not return, she gave him no satisfaction in that regard. The evidence further is that appellant had a good home for appellee; that the same was well furnished and appellee herself admitted that appellnat furnished plenty to eat. Appellee, however, claims in her testimony that he did not furnish her with any large amount of money to spend and that he required her to give strict account of what she spent and as to what became of the eggs and produce on the farm that she had to do with. She admitted, however, he allowed her to draw checks and that he had made arrangements with the Bank to charge the same to his account. Several of the neighbors testified on behalf of appellant that his wife was well dressed and that so far as they observed, she was always well treated by her husband and that he was affectionate toward his children.

The evidence in the record is further to the effect that appellant was sober, industrious; attentive to his business, and while economical, at the same time he provided for his family

as well as persons ordinarily do in his circumstances. It is evident from the record that appellee's mother was more or less of a disturbing element in the family. She was averse to appellee bearing children and made her mind known in that behalf, not only to appellee, but to appellant. The attitude of Mrs. Meadows in this matter stirred up more or less friction between her and appellant. Appellant offered in evidence a letter written by appellee's mother to appellee while she was pregnant and before the birth of her second child, in which letter among other things she said: "I lay awake all Friday night, after getting your letter thinking about your married life and what a lucky girl you was before you married. I think it awful that you are caught again. You must not do your own washing. Now you just tell him how it is and let him pay for having it done for you will be the one that has to suffer and maybe die and leave them for some other woman. Now I want you to do what I am telling you or you need not expect anything from me * * When you write you tell me that you have a wash woman or I am going to do something myself. I am sick and tired of the way things are going and you know me when I get so much and I have got about all I can take now don't think I am scolding you for I am not for I would go through fire for you I know how the darn men are the whole darn bunch are alike I am sure done with the whole bunch of them. All my troubles has been on the account of a man I am about wore thread bare You need not be surprised to see me up there any time for I am going to see that you are taken care of."

Appellant further testified that Mrs. Meadows said to him: "If a man didn't treat Audra right, why she would take her away from him. I asked her what did she mean by that and she said that she didn't think that a man would treat Audra right if they had children. And then another time she said, about the time of the birth of the first child, she said during the birth of the first child that this having children will never happen again. Then another time a little later she spoke it was in June, it was before the pregnancy of the last child she said, 'Don't you think that you and Audra should separate before you have any more children.' I said, No, I don't think we should separate."

The record further discloses that on one occasion Mrs. Howe, a witness on behalf of appellee, heard Mrs. Meadows say "every God damn Cunningham of the name—" Appellant testified on one occasion she called him a "son-of-a-bitch" so that to say the least Mrs. Meadows was taking a pretty strong hand in the affairs of the Cunningham family.

Section 1 of the Act in relation to married women provides; among other things, "that women who without their fault now live or hereafter may live separate and apart from their husbands may have a remedy in equity against their said husbands for reasonable support and maintenance, while they so live or have lived separate and apart." To maintain such a bill by a wife against her husband she must show she has good cause for living separate and apart from her husband and also that such living separate and apart from her husband was without fault on her part. Whale v. Whale 71 Ill. 510; Johnson v. Johnson, 125 Ill. 510; Decker v. Decker, 279 Ill. 300.

In construing the word "fault" courts have held it to mean "voluntarily consenting by the wife to separation or such failure of duty or misconduct on her part that contributed materially to a disruption of the martial relation." Johnson v. Johnson, supra; Jackman v Jackman 213 App. 329.

To authorize a decree for separate maintenance of a wife, other than for the causes for

which a divorce would be granted, it ought to at least be proven that there was reasonable danger of personal violence to her, or a persistent, unjustifiable course of conduct on the part of the husband which would continue to render her miserable if she remained with him and that conduct of the husband was not in any considerable degree induced by her fault. Whale v. Whale, 71 Ill. 510. Johnson v. Johnson, supra.

Incompatibility of disposition, occasional ebullitions of passion, trival difficulties, or slight moral obliquities, will not justify the wife in separating from her husband and claiming a separate maintenance. Johnson v. Johnson, supra.; Ross v. Ross, 109 App. 157-162.

We have gone over this record carefully and fail to find evidence of acts of misconduct on the part of appellant which would justify a decree of separate maintenance in favor of appellee. While the evidence in the record discloses that appellant has not conducted himself in a manner altogether pleasing to his wife. While in a pregnant condition she was doubtless more or less nervous and more easily annoyed than she otherwise would have been, yet the conduct of appellant cannot be said to be of such a nature as to render the life of a reasonable wife unendurable. Neither can appellant's conduct be interpreted to be such as woud cause fear on the part of appellee for her life or as endangering to her health.

There is a charge in the bill of nagging and fault finding on the part of appellant and to the effect he was a man of violent passion and ungovernable temper, but the record does not substantiate these charges.

The law further is that even though it be conceded appellee was justified in leaving her husband, at the same time if appellant in good faith sought the return of his wife with her childern to his home with the evident intention of providing for them as he should and appellee refused such invitation without good cause, then she would not be living separate and apart from her husband without her fault. Johnson v. Johnson, supra.; Thomas v. Thomas, 52 Ill. 577-579; Schraeder v. Schraeder 26 App. 524.

An examination of the record leads us to the conclusion that appellant in good faith desired the return of his wife and that he made this known to her on four different occasions subsequent to her leaving. We draw this conclusion, not only from appellant's testimony, the testimony of his father and his brother-in-law who accompanied him when he called on appellee, but, also from the testimony of certain of the neighbors who testified that appellant had stated to them that he did not want his wife to leave and that he desired her return and there is nothing in the record to the contrary. Appellant in effect stated on the stand that appellee was welcome back and that he was able to support her.

The record discloses that there is no sufficient reason why this husband and wife with their two children should not again come together and make a comfortable and happy home. This they should do, no only for their own sake, butfor the sake of their two children. The obligation is on them to nurture, care for and educate these children they have brought into the world. No encouragement can be given to theliving apart of husband and wife. The law and the good of society alike forbid it. Ross v. Ross, supra. Johnson v. Johnson, supra. 515.

Some contention is made by counsel for appellant that the Judge who rendered the decree in this case was not sitting as the Presiding Judge at the Term of its rendition. In the view we have taken of the case we do not deem it necessary to pass on this assignment of error. Ap-

pellee is not raising the question and we are holding that the evidence in the record does not justify the decree rendered and that the bill should be dismissed for want of equity.

For the reasons above set forth the judgment and decree of the trial court will be reversed and the cause will be remanded with directions to dismiss the bill for want of equity.

Reversed and remanded

Not to be reported.

(3283 A)

Term No. 54. Agenda No. 22.

In The

APPELLATE COURT OF ILLINOIS

Fourth District

March Term, A. D. 1923.

Grover C. Campbell, Appellee. v. The Baltimore and Ohio Railroad Company, Appellant.	Appeal from Circuit Court White County.

Opinion by Boggs, P. J.

This is an action in case brought under the Federal Employers' Liability Act, by appellee against appellant in the Circuit Court of White County.

The declaration consists of one count and alleges in substance that appellant on and prior to October 17, 1921, was operating a railroad engaged in inter-state commerce; that on the day in question appellee was employed in inter-state commerce as a section hand on appellant's railroad, and as such, was riding on a certain motor work car, and while appellee in the exercise of ordinary care for his own safety, appellant's foreman, who was in charge of the operation and management of said car, wrongfully and negligently caused the same to be stopped with "great and unusual suddenness, force and violence" and as a direct result thereof said car was derailed and appellee was thrown therefrom and received the injuries for which said suit was brought.

To said declaration the appellant filed a plea of not guilty. A trial was had resulting in a verdict and judgment in favor of appellee for $500.00. To reverse said judgment this appeal is prosecuted.

It is first contended by appellant for a reversal of said judgment that the Court erred in refusing to exclude the evidence and direct a verdict in favor of appellant. A motion therefor having been made by appellant at the closeof all the evidence. A motion to direct a verdict raises the question as to whether or not there is any evidence in the record fairly tending to support the plaintiff's cause of action. It is not a question of the weight of the evidence. That is a question for the jury. Chicago & Joliet Ry. Co. v. Wanic, 230 Ill. 530-533; C. & E. I. R. R. Co. v. Schmitz, 211 Ill. 447; Chicago City Ry. Co. v. Martensen, 198 Ill. 511; Chicago City Ry. Co. v Carroll, 206 Ill. 318; Chicago & Eastern Ry. Co. v. Snedaker, 223 Ill. 395. In our opinion the evidence in the record with the inferences reasonable to be drawn therefrom fairly tended to prove appellee's cause of action. The Court therefore did not err in refusing to direct a verdict in favor of appellant.

It is next urged that the Court erred in giving instruction No. 2, given on behalf of appellee, for the reason it is contended that the Court in said instruction should have instructed the jury that they had the right under the law to mitigate the damage to the extent that appellee's negligence, if any, may have contributed to the injury. We do not think the instruction erroneous in that respect, for the reason that the jury were required before they could return a verdict for appellee, to find that at the time in question, he was using ordinary care and caution for his own safety, thereby eliminating the question of the mitigation of damages.

Appellant's counsel also contends that said instruction gave the jury too much latitude in fixing appellee's damages and cites certain cases in support of said contention. The instruction here involved is different from the instructions in the cases cited by appellant's counsel. There was no error in the giving of this instruction on the point raised. Terminal R. R. v. Thompson, 210 Ill. 226, and in I. C. R. R. Co. v. Cozby, 174 Ill. 109.

It is also argued that appellee's given instruction No. 3 is erroneous. This instruction informed the jury that under an Act of Congress then in force "every common carrier by railroad while engaged in commerce between any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in commerce, or in case of death of such employee to his or her personal representatives for the benefit of the surviving widow and children of such employee, if such injury or death results in whole or in part from the negligence of any of the servants, agents or employees of such carrier," and that where action is brought under the provisions of said Act for injuries to an employee the fact that the employee may have been guilty of contributory negligence is not a bar to a recovery, but the damages shall be diminished in proportion to the amount of negligence attributable to such employee. We do not see wherein the giving of this instruction was prejudicial to appellant and as it states a correct principle of law applicable to the facts in the case, we hold the Court did not err in giving the same. In a personal injury case, founded on the Employers' Liability Act, the giving of an instruction based on Section One, if applicable to the facts, is not erroneous even though abstract in form. Meier v. C. C. C. & St. L. Ry. Co. 206 Ill. App. 285. It might also be observed that this instruction covers the very point appellant is insisting instruction No. 2 should have covered.

It is also insisted by appellant that the Court erred in refusing to give its instruction No. 8. We have examined this instruction and find that in so far as it states correct principles of law it is covered by other instructions given by the Court on its behalf. The Court did not err in refusing this instruction. Only three instructions were given on behalf of appellee, while ten were given on behalf of appellant. Appellant's given instructions fully covered its theory of the case.

It is next contended by appellant that the verdict is against the manifest weight of the evidence. The record discloses on the day in question the section crew had finished the work on which they were engaged about 2:30 o'clock in the afternoon and were returning on said work car to Enfield. Said car had a platform, the center portion of the top being about eighteen inches higher than the two side portions. The foreman was riding in front on the left side of the car and appellee was riding in the front on the right side of the car. The witness, Winemiller was riding on the rear of the car. The movements of the car were controlled by

the foreman. At the time in question the car was travelling about ten or twelve miles per hour. Appellee testified that he noticed a line bar which they were carrying had slipped forward and tipped downward in front of the car. He halloowed to the foreman. When he did this, the foreman put on the brakes and appellee having hold of the line bar was thrown to the side of the car. The car left the tracks and appellee testified that the car ran over him. The foreman testified that his attention was called to the front end of the line bar tipping down and that he threw off the belt and put on the brakes to stop the car as rapidly as he could; that the bar stuck down in front of the car on the south side of the ties and that in his opinion it fell across the rail; that the car went off the side of the track with the exception of one wheel and all three members of the crew were thrown from the car. Appellee was knocked unconscious.

The testimony of the witness Winemiller is: 'That he was riding on the back of the car and that he did not see the line bar fall off; all he could say was that the car stopped and that he was thrown something like twenty feet. He testified on cross examination "I was shot off into space. I was something like twenty or thirty feet north of the car. I was shot off north something like twenty or thirty feet." This, in substance, is the evidence with reference to how the accident occurred.

It is the contention of appellant that there is nothing in the record to show that the foreman in stopping the car at the time in question was guilty of any negligence; that he did just what any other person would have done under the same circumstances, and that the line bar falling on the track caused the car to be derailed and that this is the thing that caused the in jury. On the other hand, counsel for appellee contend that appellant's foreman wrongfully caused said car to be stopped with such force and violence that as a result thereof he was t hrown from the car and received the injury in question.

It may be observed with reference to the contention of appellee that his testimony was to the effect that the rail in question did not fall in front of the car. He also testified that the bar did not cause the car to be derailed. The first part of his statement is with reference to a question of fact. His statement that the bar did not cause the derailing of the car is a conclusion.

Ordinarily it is for the jury to determine and pass on the question as to whether or not a defendant in a given case is guilty of the negligence charged in the declaration. In Wabash Ry. Co. v. Brown, 152 Ill. 484, the Court at page 488 says: "Negligence is ordinarily a question of fact. Where the evidence on material facts is conflicting, or where, on undisputed facts, fair-minded men of ordinary intelligence may differ as to the inferences to be drawn, or where, on even a conceded state of facts, a different conclusion would reasonably be reached by different minds, in all such cases negligence is a question of fact. The fact to be determined is the existence or non-existence of negligence. With all the facts considered, if there is a reasonable chance of conclusions differing thereon, then it is a question for a jury." We are not prepared to say that the finding of the jury is against the manifest weight of the evidence.

It is next contended by appellant that appellee assumed the risk of his employment and that that question should have been submitted to the jury. That question was submitted to the jury in two of appellant's instructions. It might be observed, however, that the doctrine

of assumed risk would not apply, except in so far as it pertained to the risk incident to the carrying of said bar was concerned. In actions based on the Federal Employers' Liability Act, an employee does not assume the risk incident to the negligence of a fellow employee. Devine v. C. R. I. & P. Ry. Co. 266 Ill. 248; Kusturin v. C. & A. R. R. Co. 287 Ill. 306.

In the latter case at page 318, the Court says: "It is also contended on the part of the plaintiff in error that defendant in error assumed the risk of injury from fellow-servants. Under the Federal Employers' Liability Act the fellow-servant doctrine is no longer available as a defense, and if his injury was caused by the negligence of other members of the gang in loading rails he did not under the facts in this case assume the risk of such negligence. Devine v. Chicago, Rock Island and Pacific Railway Co. 266 Ill. 248; Boldt. v. Pennsylvania Railroad Company, 245 U. S. 441.

Lastly it is contended by appellant that the verdict is excessive. The verdict in this case was for $500.00. While the evidence in the case is not entirely satisfactory as to the extent of appellee's injuries, at the same time the evidence conclusively shows that at the time of the accident he was thrown some fifteen or twenty feet and from the injury he received he was unconscious; that he had several bruises and abrasions. He, himself testified that his chest was crushed in and that some of his bones were broken. The doctors who examined him did not find any broken bones.

The record discloses that appellee lost considerable time on account of said injuries. We are not prepared to say that the damagse in this case were so excessive that they could be held to be the result of prejudice and passion on the part of the jury. We would therefore not be warranted in reversing the judgment for that reason.

Finding no reversible error in the record, the judgment of the trial Court will be affirmed.

Judgment Affirmed.

Not to be reported.

Rehearing denied
10/25-1923

Term No. 56. Agenda No. 52.

In The

APPELLATE COURT OF ILLINOIS

Fourth District

March Term, A. D. 1923

Louis Latinette, Appellee. v. Southern Railway Co., Appellant.	Appeal from the City Court of East St. Louis, Illinois.

Opinion By Boggs, P. J.

During the years 1919, 1920, 1921 and 1922 appellee was farming in wheat a small tract of land, of thirteen and one-half acres, on the south side of the right of way of appellant's railroad. Appellant was possessed of an eighteen inch sewer running along its right of way adjoining said land. Said sewer for the most part is above the land in question and the evidence discloses that there was a break in said sewer and the water escaped therefrom on to the land farmed by appellee and that during the latter part of the months of April or the first part of May, of each of the foregoing years, about four and one-half acres of growing wheat was destroyed on said land.

An action on the case was brought by appellee against appellant in the City Court of East St. Louis, to recover for the loss of said crops. The declaration consisted of one count and charges among other things that appellant negligently suffered said sewer to become broken and holes to remain therein so that the water flowed therefrom on to appellee's land, causing a complete loss of five acres of wheat, during the years aforesaid. Appellant filed a plea of not guilty and one special plea, allegnig that during the year 1919, said railroad was under the control and management of the United States Railway Administration. The cause was tried resulting in a verdict and judgment in favor of appellee for $425.00. To reverse said judgment this appeal is prosecuted.

At the close of the evidence the Court excluded the evidence as to any damages that may have occurred prior to March 1st. 1920 on the ground that prior to that time, the railroad in question was in the control of the United States Railway Administration.

It is first contended by the appellant for a reversal of said judgment that the Court erred in overruling the motions made by it at the close of appellee's evidence and again at the close of all the evidence, to exclude the evidence and to direct a verdict in its favor. It is only necessary for us to say that the evidence in the record offered by appellee with all the inferences reasonably to be drawn therefrom, fairly tended to prove his case. That being the state of the record the Court did not err in refusing to direct a verdict. Hewes v. C. & E. I. R. R. Co., 217 Ill. 500; McFarlane v. Chicago City Ry. Co. 288 Ill. 476.

It is next insisted by appellant that the Court erred in its rulings on the evidence. It being the contention of appellant that the Court allowed appellee to offer evidence on the wrong theory as to the measure of damages. The Court in two or three instances allowed appellee to testify with reference to the amount which he received from the sale of the wheat on that part of the land not covered by the water. We are inclined to think that the Court erred in admitting this evidence. However, the Court advised counsel that the true measure of damages was the value of the crop at the time of its destruction and the case was tried on that theory. The measure of damages to a growing crop is the value at the time of destruction with the right of the owner to harvest at the proper time and the value is a matter of estimate, or conclusion of the mind to be arrived at from all the facts. Comerford v. Morrison, 145 Ill. App. 615; St. L. M. B. Ry. v. Schultz, 226 Ill. 409; B. & O. S. W. Ry. Co. v. Stewart, 128 Ill. App. 270.

The Court except for the two or three questions referred to tried the case and instructed the jury on the theory that the measure of damages is as above stated. We therefore hold that there was no reversible error in the ruling of the Court on the evidence.

Counsel for appellant concede that the damages, if any, are to be arrived at by showing the value of the crops at the time of their destruction, but insist that there is no evidence in the record as to the amount of such damages, if any, on this theory. An examination of the record clearly discloses that appellant is mistaken in regard thereto. The evidence of the various witnesses who testified with reference to the damages were except as above stated, confined by the Court to that measure of damages, and is sufficient to sustain the verdict.

It is also contended by appellant that it does not sufficiently appear that the damages, if any, caused to appellee's wheat was by reason of the break in appellant's sewer and that subsequent escape of water therefrom on to the lands affirmed by appellee. The law is that where the evidence discloses that water from different sources caused the damage, the loss therefrom is a question for the jury.

In Ohio & Mississippi Ry. Co. v. Combs, 43 Ill. App. 119, this Court in discussing a question of this character, at page 119 says: "It is apparent from this evidence that several causes combined to cause this overflow, and we find in this record sufficient evidence to warrant the verdict that the filling in of the trestle tended to increase the flow of water toward plaintiff's land, and contributed to his damage. On the authority of C. & N. W. R. Co. v. Hoag, 90 Ill. 339, it must be held that when thejury have evidence of injury by water coming from different sources by different causes and all creating damage, the jury must be left at liberty to estimate, as best they may, from the evidence, how much of the whole damage was occasioned by the water coming from a particular source from a particular cause." It was therefore a question for the jury as to what caused the damage to appellee's land and we are not disposed to disturb the verdict on that question.

It is next contended by appellant that the verdict is excessive. While we are of the opinion that the verdict is amply large, still, on the record in this case it is not so excessive that we can say the jury were governed by prejudice or passion in returning the same. We would, therefore, not be warranted in reversing the cause for that reason.

Finding no reversible error in the record, the judgment of the trial Court is affirmed.

Judgment Affirmed.

Not to be reported in full.

Term No. 60 Agenda No. 13

IN THE

APPELLATE COURT OF ILLINOIS

Fourth District

March Term, A. D. 1923.

The People of the State of Illinois ex rel. Edward H. Frank, Henry Schlueter, Louis Zak, C. A. Kellerman, W. H. Hotz, A. W. Hellinger, Ed. Sheppard, Henry P. Hotz, J. R. Wollbrinck, E. W. Bradshaw, A. Degenfelder and Henry Ax, Appellee, vs. Joseph P. Streuber, State's Attorney of Madison County, Illinois, Appellant.	Appeal from the Circuit Court of Madison County.

Opinion by Boggs, P. J.

This case was before this Court at the October Term, A. D. 1922. See opinion filed November 16th. The relators filed a petition for mandamus to compel the State's Attorney of Madison County to sign and file a petition for Quo Warranto against Frank L. Nash et al to test their right to hold certain city offices in the City of Edwardsville. A demurrer interposed to said petition was sustained by the Court and on writ of error this Court reversed the judgment of the Circuit Court with direction to overrule the demurrer to said petition. The case was redocketed in the Circuit Court of Madison County and an order was entered overruling said demurrer. Thereupon, three pleas were filed by appellant to said petition. Demurrers to said pleas were sustained by the Court and appellant having elected to abide by the pleas, a peremptory writ of mandamus was awarded as prayed. To reverse said judgment this appeal is prosecuted.

It is contended by appellant for a reversal of said judgment that the Court erred in sustaining the demurrers to said pleas. The first plea avers that the relator, Henry P. Hotz, on May 2, 1921, as Mayor of said City, issued a commission to Frank L. Nash declaring him to have been duly elected Mayor of said city and that he abandoned and turned over the office of Mayor to Nash. The second plea avers that relator Henry P. Hotz ought not to be permitted to say that his individual and private rights are involved because said realtor while Mayor of said City failed to have the City Council designate the place or places for the holding of the City primary election in April 1921, and to appoint judges and clerks of such election, and to cause notices thereof to be printed; and that said Henry P. Hotz while such

Mayor failed to see that a City primary was held in said City in April 1921, as required by law. The third plea is in effect the same as the first.

It is the contention of appellant that the allegations of said pleas are a sufficient answer to the averments of the petition; that by demurring thereto the facts set forth therein are admitted and that it follows the writ of mandamus should not have been awarded. It is further insisted by appellant that the facts set forth in said pleas were within the knowledge of the State's Attorney and show that the relator Hotz is not entitled to a writ of quo warranto and that therefore the State's Attorney may lawfully refuse to act. In support thereof, counsel for appellant cite Kenneally v. Chicago, 220 Ill. 485. An examination of this case discloses that the point here involved was not before the Court.

In People v. Healy, 230 Ill. 280, and which was cited and quoted from in the opinion filed heretofore in this case, the Supreme Court in discussing the rights of a realtor to have his petition for leave to file an information in the nature of a quo warranto signed by the State's Attorney, at page 290 says:

"When the legislature extended the right to private individuals to assert private rights by this proceeding, it is apparent that it was intended that they should have an opportunity to seek redress for their wrongs by making application to a court, or judge thereof, for leave to file an information. The duty resting upon the State's Attorney to sign and present a petition for leave to file an information in the nature of a quo warranto where evidence of facts is properly presented to him by a proposed relator which shows prima facie that the relator is legally entitled to the relief, in reference to a private right, which would be afforded him by a judgment in his favor in a quo warranto proceeding, is an absolute one. It follows, therefore, that where he declines to act for any reason other than that the facts, evidence of the existence of which is presented to him, do not warrant the relief which the proposed relator seeks, or that the petition and affidavit or affidavits presented to him are not in proper legal form, his declination is an abuse of his discretion, conceding that his construction of the statute be correct, and such an abuse of discretion as amounts to a refusal on his part to exercise his discretion at all and to a refusal to perform the duty enjoined upon him by the law."

In People v. Healy, 231 Ill. 629, the Court in discussing a question of this character at page 634, referring to People v. Healy, Supra, said: "It was there held that in all cases which are, in fact, prosecutions on the part of the people, involving no personal or individual right, the State's Attorney is vested with the same discretion originally exercised by him at the common law, when an information in the nature of a quo warranto was solely a prerogative remedy of the crown; but under our statute, which has enlarged the scope of the remedy for the protection of individual rights, if an individual having a private and personal grievance for which the proceeding is the only remedy shall present a proper petition to the State's Attorney, with evidence of the facts necessary to establish his right, it is the duty of such State's Attorney to apply for leave to file an information, and if he refuses he may be compelled by mandamus to perform that duty."

We held on the former hearing of this case that the petition and affidavits in support thereof were a sufficient showing to make it the duty of the State's Attorney to sign said petition; that being true under the holding of the Supreme Court in the foregoing cases, we are

of the opinion and hold that the questions sought to be raised by the pleas filed in this proceeding are not proper on this hearing and that the court rightfully sustained the demurrers thereto.

Where the rights of the individual and the People are both involved, if the petition and supporting affidavits are sufficient to show that the relator has such an interest in the proceeding as entitles him to have the same passed on by the Court, it is the duty of the State's Attorney to sign the petition, and he cannot arbitrarilly refuse so to do. People v. Healy, 230 Ill. Supra.

The State's Attorney is not called upon to go outside of the petition and affidavits presented to him for the purpose of ascertaining whether he should sign and present the same to the Court. In People v. Healy, 230 Ill. Supra, the Court at page 297 says: "The practice pursued by the State's Attorney in this case is not a proper one. Upon the petition being presented he caused the actual parties to the controversy, by their attorneys, to appear before him, and heard them on the proposition as to whether he should sign and file the petition. This practice has, we understand, been long pursued in certain counties of this State, and we have no doubt the public prosecutor of Cook, in this particular instance, proceeded as he did believing in good faith that this practice was the correct one. In our judgment the law of this State does not authorize him in any case to conduct a hearing of this character, and he should not have considered the views of the respondent named in the petition or those of his attorneys."

It is to be observed in this case that the term of office of Frank L. Nash as Mayor of the City of Edwardsville has terminated and that this proceeding has become more or less academic and we would probably have been justified in refusing to consider it for that reason. People ex rel v. Dunn, 258 Ill. 441.

Inasmuch as at the time of the entry of the order awarding said writ, the term of office of the respondent Nash had not expired the Court properly entered the same and its judgment should therefore be affirmed.

Whether or not leave to file an Information shall finally be allowed, is for the Trial Court when a petition is presented. That matter lies in the sound legal discretion of the Court. People ex rel. v. Waite, 70 Ill. 25; People ex rel. v. Rendleman, 250 Ill. 289; People ex rel. v. Healy 230 Ill. Supra.

For the reasons above set forth the judgment of the Trial Court will be affirmed.

Judgment Affirmed.

Not to be reported.

(32851)

STATE OF ILLINOIS.
APPELLATE COURT
4TH. DISTRICT.

MARCH TERM A. D. 1923.

TERM NO. 20. AG. NO. 29.

BURREL E. LEFFLER. Deft. in Error. vs. HENRY WARDEIN, Pltff. in Error.	ERROR TO CITY COURT OF CITY OF ALTON.

Barry, J.—Plaintiff had the general contract for the erection of St. Peter's Church at Lindsay, Texas. Defendant agreed with plaintiff that for $10,080.00 he would do all the brick work, set all cut stone, furnish and pay for the lime, cement, and labor. Defendant had a bill of $1152.28 for extras about which there seems to be no substantial dispute, thus making the total amount of the claim $11,232.28. He admitted that plaintiff had paid him in money or its equivalent $7,649.65 leaving a balance of $3,582.63 to recover which he sued in assumpsit. Plaintiff pleaded the general issue and gave notice that he would claim that defendant had failed to perform his work in a proper manner and that by reason thereof he was compelled to expend the sum of $4570.01 in order to make the work satisfactory to the architect and the owner. The trial resulted in a verdict and judgement for defendant in the sum of $2800.00. The only contention urged is that the verdict is contrary to the evidence.

It is argued that defendant did not use a proper amount of lime and cement in the mortar and that by reason thereof the frost caused it to become soft and dry and to crumble and fall out of the joints. There was a serious conflict in the evidence upon that question. Defendant and his witnesses testified that they used the usual amount of lime and cement and there was evidence that during the progress of the work the architect observed the mortar that was being used and told the defendant that it was better than he had used on another job that was satisfactory. Under the specifications, the owner was to furnish the water for the brick work construction. The evidence shows that the weather was extremely hot while the walls were being built and that the owner did not furnish a sufficient amount of water to wet the bricks and that they were so hot they absorbed the moisture too readily from the mortar.

More than $3000.00 of plaintiff's counter-claim of $4570.01 is for tuckpointing and repointing alleged defective brick joints. It is claimed that this work was rendered necessary because defendant failed to tuckpoint the joints as required by the specifications and also

because he used poor mortar that did not contain the proper amount of lime and cement. The latter question has been covered by what we have already said as to the state of the proof in regard to the mortar used. The evidence shows that while the specifications called for tuckpointing of the joints the architect admitted that he told defendant that he liked the struck-off joints better and to make them that way which he did.

It would seem that after the work had beendone under the architect's direction, he or some one else decided it should have been donethe other way. We do not think the architect should be permitted to change his mind afterthe work was done as he called for it and then put the expense of tuckpointing on defendant.

It is claimed that about $1,000.00 of plaintiff's counter claim was made necessary because defendant did not build through arches to carry the weight of the interior walls and that by reason thereof the weight of those walls crushed the columns and pilasters on which the smaller arches rested. There was a serious conflict in the evidence as to whether there was anything in the plans or specifications that indicated that defendant should do anything more than he did. The owner furnished the stone and the evidence is undisputed that it was extremely soft. In that connection it is claimed that the stone columns were not properly bedded in the mortar but that was a controverted fact.

It is argued that defendant failed to put a lining in the flue but we find no evidence that defendant was required by his contract to furnish the lining or that the same was furnished to him by any one. We have carefully considered all of plaintiff's contentions and in our opinion we would not be warranted in holding that the verdict is manifestly against the weight of the evidence. The judgment is affimed.

AFFIRMED.

Not to be reported.

Re-hearing denied
1923 1923

STATE OF ILLINOIS
APPELLATE COURT
4TH. DISTRICT.

MARCH TERM A. D. 1923.

TERM NO. 22. AG. NO. 17.

T. W. HAY, Appellant, vs JOHN COLLARD, Appellee.	APPEAL FROM WHITE CIRCUIT COURT.

Barry, J. — Appellant sued before a justice of the peace to recover a balance alleged to be due him on the sale of a city lot. The case has been tried by three juries resulting in as many verdicts for appellee. In his statement of the case appellant says that his testimony shows that his price on the lot was $125.00 and he so priced it to appellee; that the latter first offered him $100.00 and then raised his offer to $110.00; that appellant then proposed to appellee that if he would give appellant the insurance on the property where he lived, to write, to offset the difference between them, he would sell him the lot for $110.00; that appellee agreed to this; that the lot was conveyed to him and he paid the $110.00 and gave to appellant the following instrument: "Agreement: In lieu of lowering the price on lot 24 Shipley Hill Add. from $125.00 to $110.00, I hereby agree to give my insurance covering my dwelling house where I now live to T. W. Hay, at the expiration of same. John Collard. The notes are to be at regular rates when insurance is written." Appellant says that appellee refused to permit him to write the insurance on his dwelling.

On the trial appellee testified, without objection, that appellant never asked him more than $110.00 for the lot at any time; that after the deal was closed, the money paid and the deed delivered, appellant said to him "you ought to give me some insurance" and that he replied, "when my insurance expires I will"; that appellant then wrote out the instrument aforesaid and appellee signed it.

Appellant contends that the said instrument is a written contract and that the court erred in admitting parol testimony that would vary or contradict the terms or legal effect thereof and that evidence denying the terms of the contract was not permissible without first filing an affidavit denying the execution of the instrument. It is sufficient to say that appellant did not make a single objection to the admission of evidence during the trial of the case. Having failed to save the question by objections and exceptions he cannot now be heard to complain.

He next contends that the court erred in giving appellee's second and third instructions

but in his motion for a new trial he limited his complaint as to instructions to the fourth and that alone. All grounds for a new trial not set forth in the written motion are waived, Yarber vs. C. & A. Ry. Co. 235 Ill. 589. Appellee's fourth instruction is erroneous but not for the reasons urged by appellant.

The evidence on behalf of appellant shows that appellee never agreed at any time to pay $125.00 for the lot. He admits that his proposal was to sell appellee the lot for $110.00 if he would give appellant the insurance on his dwelling at its expiration and that appellee assented thereto.

If appellee had agreed to pay $125.00 for the lot, $110.00 in cash and the balance by giving appellant the insurance on his dwelling and he failed or refused to allow appellant to write the insurance he would be liable for $15.00, Smith vs. Dunlap 12 Ill. 184. The contract, as claimed by appellant, was that appellee agreed to pay but $110.00 and to give him the insurance in full payment for the lot. If appellee had agreed to pay $110.00 and to give appellant a shoat for the lot and appellee failed to deliver the shoat he would only be liable for its value. So in the case at bar all that appellant has lost by reason of the alleged breach of the contract is his usual and customary commissions for writing the insurance.

Presumably the insurance appellant was to write was for the same amount and for the same length of time as the old policy that was on appellee's dwelling at the time the contract was made. Appellant offered no evidence in regard thereto nor did he show what he had lost in the way of commissions. The agent who finally wrote appellee's insurance said he wrote it on his house, household goods and two barns; that he thought it was for $2,000.00 but did not remember whether it was for three or five years; that if it was for three years the commissions would be $6.50 and if for five years $10.15. From that testimony it can not be determined what appellant's commission would have been if he had written the insurance on the dwelling.

Appellant contends that the court erred in refusing all of his instructions. His first instruction was to the effect that if he proved the contract as claimed by him and that appellee failed to comply with its terms the verdict of the jury should be in his favor for so much as the evidence shows his damages to be. As there was no proof as to the amount of his damages he would have been entitled to nothing more than nominal damages and the court did not err in refusing that instruction. His second third, fourth, and fifth instructions were on the theory that the measure of damages was $15.00 and were properly refused.

Under the evidence which was not objected to the jury had a right to find the contract was as claimed by appellee. If appellant never asked him more than $110.00 for the lot and he never agreed to pay more and closed the deal on that basis before anything was said about insurance the agreement as to letting appellant have the insurance was a mere *nudum pactum*. Finding no reversible error in the record of which appellant is entitled to complain, the judgment is affirmed.

AFFIRMED.

Not to be reported.

STATE OF ILLINOIS
APPELLATE COURT
4TH. DISTRICT.

MARCH TERM A. D. 1923.

TERM NO. 23. AG. NO. 14.

WEST VIRGINIA COAL CO. et al, Appellants, vs MARY STAUB, et al, Appellees.	APPEAL FROM ST. CLAIR CIRCUIT COURT.

Barry, J. — In their declaration appellees charged that they were lawfully possessed of certain real estate and that appellants were possessed of so much of the coal underlying the surface thereof which could be removed without injury thereto: that appellants removed so much coal from the said premises that by reason thereof a portion of the surface subsided to the great injury and damage of appellees, etc. Appellants pleaded the general issue and upon a trial appellees recovered a verdict and judgment for $500.00.

Appellants insist that the judgment should be reversed because appellees failed to prove their case and also for the reason that the verdict is excessive. The testimony on behalf of appellees was confined to the nature and extent of the subsidence and the expense of filling the depression so as to render it as fit for cultivation as it was before. They offered no evidence tending to show that appellants had removed any coal from the premises in question or from any other premises.

Appellees contend that the plea of the general issue admits not only the matters of inducement in the declaration, but also the very gist of the action, to-wit:— that appellants had removed so much coal from the premises as to cause the surface to subside to the damage of appellees. They claim that the only question in issue was the amount of the damage. The cases relied upon by them do not support their contention. No case has been cited and we know of none that goes to the extent of holding that a plea of the general issue is an action on the case admits the entire cause of action except the amount of the damages.

The parties tried the case on the theory that the measure of damages was the expense of filling the depression. The area involved in the subsidence does not exceed one-fifth of an acre. The depression is not uniform but is much deeper in places. Appellees furnished no evidence as to the number of cubic yards of earth it would take for the filling. They called no witness who had any experience in filling such places or in having them filled and produced no evidence as to what was the usual and customary charges for such work. Ap-

pellant's mining engineer testified to having measured the depression and said that about 35 cubic yards of earth were displaced by the subsidence. He also said he had large experience as an engineer in such matters and knew the cost of such fillings and that the cost thereof in the vicinity of the premises in question has been from twenty-seven to forty cents per cubic yard.

Even if appellees had proven that appellants were responsible for the subsidence the evidence in this record would not support a verdict for $500.00. The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.

STATE OF ILLINOIS
APPELLATE COURT
4TH. DISTRICT

MARCH TERM, A. D. 1923.

TERM NO. 32. AG. NO. 38

BECKLEY CARDY CO. et al.
(William Toelle, Appellant)
vs.
BOARD OF EDUCATION OF
NOBLE COMMUNITY HIGH SCHOOL
DISTRICT NO. 77,
Appellee.

APPEAL FROM
RICHLAND
CIRCUIT COURT.

Barry, J.—The validity of the organization of Noble Community High School District was settled by the Supreme Court on Dec. 22, 1921, People vs. Henry, 301 Ill. 51. Shortly thereafter the Board of Education advertised for bids for the erection of a school house and the same were to be considered at a meeting to be held on Jan. 28, 1922. Appellant and other contractors submitted bids and were present at that meeting of the board. It was then and there stated that notices were posted for an election to be held on Feby. 14th. to vote on the question as to whether the district should be dissolved. The awarding of the contract was postponed until the next meeting of the Board on Feby. 6th. 1922. At that meeting appellant was again present and the coming election was again discussed. Some members of the Board stated that they thought the district would stand while others expressed a belief that it would be dissolved.

The architect testified that appellant and other bidders then knew that the election was to be held in a few days and that all said they were running a risk but believed the district would be saved. Mr. Meredith, one of the members of the Board, says it was conceded that if the district was voted out the Board would be powerless. Mr. Palmer, another member, says it was stated in appellant's presence at that meeting that the contract would not be any good and could not be turned over until after the election. The president of the Board testified that appellant said it was a fallacy to talk about the district being dissolved, that he would come and help put it over. He also says they had an agreement with appellant to notify him by first mail if the district was voted out. A witness testified that on the evening of February 6th. appellant said he was going to build the school house whether it was voted out or not.

Appellant testified that on February 6th. he did not know the people were to vote on the question of a dissolution of the district, and that he did not remember that it was said at that meeting that the whole business hinged upon the result of the election. At that time the

Board had not procured a site for the building and appellant admits that the secretary then informed him that it might require a condemnation suit to secure it.

On February 6th. and under the conditions aforesaid the Board voted to award the contract for the erection of the building to appellant. The action of the Board in that regard did not make a contract, Smith vs. Ind. School Dist. 108 Minn. 322; 122 N. W. 173. A few days later the architect prepared a contract in which appellant was named as a party of the first part and "The Board of Education of the Noble Community High School District No. 77,—J. O. Henry, Pres., R. S. Hanna, Sec'y.; John Palmer, R. L. Meredith and John L. Real, or their successors," as party of the second part. The corporate name was not signed to the contract but the same was signed: "J. O. Henry,—R. S. Palmer,—John Palmer,—Robert L. Meredith," and was sent to appellant. He says he received it on Feby. 11th. 1922 and returned one copy to the Board by mail on June 1st. 1922. He does not say when he signed the contract.

The evidence shows that on Feby. 15th. the Board wrote appellant advising that the election held on the 14th. had resulted in the defeat of the district and that the Board would be powerless to do anything. Appellant admits he received that letter about four days after he received the contract. When he received the notice he had not informed the Board in any way that the contract was satisfactory, nor is there any evidence that he had then signed the contract. The Board heard nothing from him until it received a letter from his attorneys dated April 21, 1922, in which they stated that appellant, "is *now* ready to perform and carry out all his duties and obligations under said contract and unless you the parties of the second part select the necessary site X X X, X X X, within 15 days of the receipt of this notice, the party of the first part will institute suit to recover all loss and damage sustained, etc."

On July 5, 1922, Appellant sued the Board in Assumpsit for $10,000.00 for loss of profits on the alleged contract. A number of suits were brought against the Board and later the plaintiffs filed a bill in equity against the Board and all of the matters were heard by the Chancellor, who found against the claim of appellant.

In view of all of the evidence in the record we are of the opinion that appellant never had a valid, binding contract with the Board of Education, and that the decree is right and should be affirmed.

AFFIRMED.

Not to be reported.

(3287)

STATE OF ILLINOIS
APPELLATE COURT
4TH. DISTRICT

MARCH TERM, A. D. 1923.

TERM NO. 37. AG. NO. 56.

ROBERT W. TIERNAN, Appellant, vs HARRY A. LASATER, et al Appellees.	APPEAL FROM WAYNE CIRCUIT COURT

Filed 7/2-23

Barry, J. — George F. Appleby placed three mortgages on 80 acres of his land in Wayne County and afterwards on March 31, 1915 conveyed the premises, with other lands, to William L. Layton. The conveyance recited: "This deed is made subject to mortgages amounting to Twelve Thousand Two Hundred Dollars which the grantees herein assume and agree to pay. The interest accumulated on these mortgages to the date of the instrument is to be paid by the grantor."

Appellee Lawrence became the owner of the $2600.00 note secured by the third mortgage and filed a bill against the said Layton, alone, to foreclose the same. He procured a decree, became the purchaser, and no redemption having been made the Master issued him deed on June 12, 1917. About three years later he sold and conveyed the premises to appellee Lasater from whom he took back a mortgage on the land for $3,000.00 to secure a part of the purchase price.

Appellant brought this suit against appellees to foreclose the first and second mortgages of $1500.00 and $500.00 respectively. He averred that, before and at the time appellee Lawrence foreclosed the third mortgage, he was the owner of the notes secured by said first and second mortgages, but was not made a party to the said Lawrence foreclosure and that appellees have no other right, title or interest in the premises other than the right to redeem from the said prior mortgages.

Appellees answered the bill and averred that while the land in question was conveyed by Appleby and wife to William L. Layton, yet the latter had no real interest in the premises but simply took the title for P. J. Soucy, his relative, and that said Soucy paid the said mortgage notes in full and therefore turned them over to appellant who is his son-in-law. They denied that appellant is the owner of said notes and averred that said mortgages are but clouds upon their title and that the notes and mortgages should be cancelled. Upon a hearing in open court the Chancellor dismissed appellant's bill for want of equity.

Appellant contends that the Court admitted improper evidence. While we think it is true, to a certain extent, yet we are of the opinion that there is ample competent eviden-

to warrant the Court in finding that P. J. Soucy was the real purchaser and equitable owner of the land and that while he was such owner he paid the notes secured by the first and second mortgages and turned them over to appellant who has no financial interest therein.

Appellant contends that even if the foregoing conclusions are sustained by the evidence yet Mr. Soucy is entitled to have the first and second mortgages foreclosed in order to protect him against the third mortgage and any rights acquired by appellees thereunder. He relies upon the rule that in the absence of evidence to the contrary the law presumes that a party intended to keep his mortgage alive, when such course is essential to his protection against an intervening title or for other purposes of security even though through ignorance of the intervening title or inadvertence, the mortgage has been discharged and the notes cancelled, Moffet vs. Farwell, 222 Ill. 543; Lowman vs. Lowman, 118 Ill. 582. In all of the cases in which that rule was announced the purchaser of the equity of redemption held a prior mortgage at the time of his purchase. In the case at bar Mr. Soucy held no mortgage at the time he acquired the property from Appleby and wife. By the terms of the deed he assumed and agreed to pay mortgages to the amount of $12,200.00.

Mr. Soucy was the owner of the premises at the time he paid the first and second mortgages and they were merged unless the Court can see that it is essential to his protection against the third mortgage that they should be kept alive. The Court could not know that he was entitled to such protection until it appeared that he had not assumed and agreed to pay the third mortgage. We are of the opinion that, under the circumstances, it was incumbent upon appellant to make such showing before the Court would be justified in holding that there was no merger.

If Mr. Soucy assumed and agreed to pay the third mortgage there was no intervening title or lien against which he needed or was entitled to protection and there is no reason why a merger should not be presumed, Hester vs. Frary, 99 App. 51. In such case he becomes liable to the holder of that mortgage who could sue him directly for the amount thereof, Dean vs. Walker, 107 Ill. 540 and Mr. Appleby could not have released him from his liability to such holder, Bay vs. Williams, 112 Ill. 91.

If a purchaser assumes and agrees to pay the mortgages on the land it is his duty to do so. If, instead of doing so, he purchases the mortgages in the name of another, a court of equity will treat the purchase as a payment and apply the doctrine of merger. The purchase will operate as a extinguishment of the debts secured by the mortgages, Drury vs. Holden, 121 Ill. 130, and they can not be kept alive for any purpose, Brossean vs. Lowy, 209 Ill. 405-411. It is a fair inference from the evidence that Mr. Soucy assumed and agreed to pay the first and second mortgages.

Where the grantee of the mortgagor takes a conveyance of the land subject to the mortgage, and expressly assumes and promies to pay it as a part of the consideration, the assignment of the incumbrance to the owner of the property works a merger thereof, because such grantee is thereby made principal debtor and the land is the primary fund for payment, so that, if he pays off the charge, it becomes extinguished, Forthman vs. Deters, 206 Ill. 159-172; Ellis vs. Bashor, 105 Pac. 214; Barnet & Jackson vs. McMillan, 58 So. 400; 27 Cyc 1331.

Pomeroy, in his work on Equity Jurisprudence, (See 794) say: "Whatever may be the

circumstances, or between whatever parties, equity will never allow a merger to be prevented and a mortgage or other security to be kept alive, when this result would aid in carrying a fraud or other unconscientious wrong into effect, under the color of legal forms. Equity only interposes to prevent a merger, in order thereby to work substantial justice'' Forthman vs. Deters, 206 Ill. 159-171.

Appellant invoked the aid of a court of equity which only interposes to prevent a merger in order to work substantial justice. He asks the court to award him such relief without showing that he is entitled thereto. To give him a decree of foreclosure would aid in carrying a fraud or other unconscientious wrong into effect under the color of legal forms in case he had assumed and agreed to pay the third mortgage. He did not make out such a case as entitled him to a decree and the court did not err in dismissing his bill for want of equity. The decree is affirmed.

AFFIRMED.

Term No. 13 Agenda No. 6

Appellate Court of Illinois
Fourth District
March Term A. D. 1923.

filed 7/2-23

E. F. McCarty, Apellee vs. Illinois Central Railroad Company, Appellant.	APPEAL FROM JASPER.

OPINION BY HIGBEE, J.

This is an action in assumpsit brought by appellee against appellant to recover damages alleged to have been caused by the negligence of appellant in failing to deliver within a reasonable time a car load of apples shipped by appellee over the lines of appellant from Lis, in Jasper County to Decatur. The declaration contains two special counts and the common counts to which the general issue was filed. On the trial a verdict was returned by the jury in favor of appellee for $239.00. Motion for new trial was overruled and judgment entered, on verdict, from which this appeal was perfected. Appellee loaded the apples in question during Friday and Saturday the 16th and 17th of September 1921 and apparently finished loading them on Sunday the 18th. Appellant had no agent at Lis and the car was billed out from Newton a station about eight miles from there. Appellee, through E. J. Rashbach, a commission man, had sold the apples for $3.90 per hundred delivered in Decatur subject to their inspection and approval by one Corrington, a dealer in that city. There were about 24,000 pounds of apples loaded loose in the car shipped out of Lis on Monday the 19th consigned to appellee at Decatur. He testified that the apples were in good condition when loaded, and in this he was corroborated by three witnesses; that he himself reached Decatur on Tuesday morning, September 20, and in company with Mr. Rashback inquired several times at appellant's freight office concerning the car, where he was told that it had not arrived; that on Wednesday morning the 21st he was informed the car was in the north yards and would soon be set for unloading, but that it was not set during that day, and he was advised that it would be set the next morning; that at that time the car was standing on a track at Sangamon Street and appellee, together with the commission man and Mr. Corrington for whom the apples had been contracted, went to that place and examined the apples; that Corrington refused to accept the apples and appellee immediately went to the freight office and insisted that the car be set; that he returned to appellant's yard and took the matter up with the yardman who said he had received no instructions concerning the setting of the car; that the car was not set until Friday morning the 23rd; that during this time the car had been standing in the hot sun and the apples were in such condition that he had to hire someone to haul part of them away; that he was able to sell only a portion of them in Decatur and the remainder he had to reconsign to Moweaqua where they were sold. As to the date when the car reached Decatur and was

set appellee is at least partially corroborated by Rashbach and Corrington, although they were not certain as to the day of the week on which they examined the apples. Appellant introduced proof which was to the effect that the car was set at Sangamon Street on Wednesday instead of Thursday, and that it was set at its final destination on Thursday instead of Friday.

It is insisted by the appellant that the judgment is contrary to the weight of the evidence. It was undoubtedly the duty of appellant safely to carry and deliver the apples at their destination within a reasonable time. (Lewellyn vs. Pere Marquette R. R. Co., 185 Ill. App 171). It was also appellant's duty to notify the consignee of the arrival of the car and until it did so its liability as a common carrier continued. (Jackson vs. N. Y. C. & H. R. R. Co., 167 Ill. App 461.) It is further the law that when the unreasonableness of the time of the delivery had been established the burden was upon appellant to excuse the delay. (Perkins vs. C. C. and St. L. Ry. Co., 183 Ill. App. 531.) Under the proofs as above stated the jury was justified in finding that there was an unreasonable delay in the setting in or delivery of the car after it reached Decatur and no proof was offered by appellant explaining or excusing this delay. There then remained the question of the amount of damages appellee would be entitled to recover. The commission man, Rashbach, testified that the market value of the apples in the condition in which they were at Decatur was not more than one half of what their market value was when he examined them at Lis on the 16th or 17th of the month. At that time he testified in effect they were worth from $3.50 to $3.90 per one hundred pounds. The evidence shows the apples were sold at retail after they were re-shipped, for $698.37 and under this proof the amount of the verdict was not excessive.

Complaint is also made that the jury was not instructed as to the correct measure of damages. There were three instructions given for appellee and four for appellant and in none of them was the jury instructed as to the rule to be applied in measuring the damages, which was the difference between the market value of the apples in the condition they were in at the time they should have been on the market in Decatur, and their market value at the time they were actually available to the market in Decatur or delivered to appellee at that place.

It would, of course, have been the proper thing for the court to have instructed the jury as to the measure of damages but we cannot hold that the failure to do so was, under the proof in this case, reversible error. Appellant could have asked such instructions had it so desired but instead of doing so it only offered instructions along the same lines as those offered by appellee.

The proof sustained the verdict, which is not excessive, and as no reversible error appears on the record the judgment is affirmed.

AFFIRMED.

Not to be reported.

Term No. 25. Agenda No. 30.

April Term, 1923.

Froney Brink,
Appellant,
vs.
Peter Brink,
Appellee.

APPEAL FROM WASHINGTON.

OPINION BY HIGBEE, J.

Appellant, Froney Brink, brought suit against her husband, appellee, Peter Brink, to the October Term of the Circuit Court of Washington County, for separate maintenance. In her bill of complaint appellant alleged that she was married to appellee on November 9, 1919, and lived with him as his wife until December 23, 1921, when she was compelled to abandon him by reason of his unkind, cruel and inhuman conduct towards her. The specific charges of the bill were that on December 22, 1921, appellee slapped, choked, and kicked appellant; that a child was born of the marriage and appelle went into the community where they resided and falsely told their neighbors and friends that the child born to his wife was not his child, but that of another man; that such untrue charges caused appellant to hang her head in shame and to refrain from going into society; that appellee was a man of ungovernable temper and on many occasions addressed to appellant opprobrious epithets and repeatedly threatened to take her life; that he was a man of some personal property and was strong and healthy, while she was sickly, weak and infirm and had no property or income of her own.

Appellee filed an answer denying in substance all the allegations of the bill except those relating to the marriage, the birth and death of the child and appellee's lack of property or income other than that derived by her from her own labor. The answer averred that the child referred to was appellee's own child and that he was very much attached to it. The proof showed that appellant left appellee about four and a half months after their marriage, apparently on account of things said and done by appellee's sister and mother. During this separation or desertion which continued for some eight months a child was born to appellant which lived about four months. After the birth of the child the parties resumed marital relations for several months when appellant again left her husband. Appellant made proof concerning an alleged offer on her part to return to live with appellee, made a short time before she brought her suit. The good faith of this alleged offer was challenged by appellee, who insists that the circumstances attending the offer show it was made simply for the purpose of aiding her to sustain this action. Upon the trial of the case the chancellor found that appellant left appellee without reasonable cause and continues such separation; that while they lived together she did not faithfully discharge her duties as a wife, and did not treat appellee with kindness, but that on the other hand appellee did treat appellant with kindness and affection and supported her according to their station in life; that appellee did not charge his wife with infidelity and was not guilty of acts of cruelty, toward her and that appellant was not living separate and apart from her husband without her fault. It was decreed that

appellant pay certain amounts stated for appellee's solicitors fees and costs and that the bill of complaint be dismissed for want of equity.

Counsel for appellant insists that under the well known rules of law applicable to cases of this character, the proof was not sufficient to sustain the findings of the chancellor and the decree based thereon.

The parties hereto are of Polish descent and the wife testified through an interpreter. She swore to facts and circumstances which tended to support the charges of her bill, while appellee denied her charges and testified to facts which seemed to show that the separation was the fault of the wife and that he had done nothing of any importance to bring it about or of which she could justly complain. Each of the parties was corroborated to some extent by other witnesses but the case as a whole hinged on the testimony of appellant on the one side and appellee on the other. It appears to us that great weight should be given and more than ordinary credit should attach to the findings of the chancellor, who heard the testimony of the witnesses in open court and observed their demeanor and was qualified from many angles of view presented to him by reason of his personal contact with the case, which are necessarily denied to us, to determine the true facts and that in the absence of proof showing that the findings of the chancellor were clearly and palpably wrong the same should not be set aside. (Coari vs. Olsen 91 Ill. 273; Kuchue vs. Malach 286 id 120).

A careful consideration of the proofs in this record shows nothing which would justify us in disturbing the findings of the chancellor and the decree is therefore affirmed.

AFFIRMED.

Not to be reported.

Term No. 26 Agenda No. 12

FOURTH DISTRICT, ILLINOIS.

March Term, A. D. 1923.

Charles Hunsaker, Appellee, vs Homer C. Cramer, Appellant.	APPEAL FROM JASPER

OPINION HIGBEE J.,

This suit was brought by Charles Hunsaker, Appellee, before a Justice of the Peace to recover from Homer C. Cramer, Appellant, the sum of $10.00 alleged to be due him for breeding service of his stallion. A trial on appeal in the Circuit Court resulted in a verdict and judgment in the sum of $5.00 for Appellee.

Appellant bred his mare to Appellee's stallion on April 23, 1921. At the time of the service Appellant signed what is referred to as a "Stud Book.", which in effect was an agreement to pay $10.00 for the service. It is contended by Appellant that on the same day and before he left Appellee's premises, it was orally agreed that if he traded or sold the mare within the county, the service fee should be paid by the owner of the mare at the time the colt should be foaled, but if he traded or sold the mare outside of the county, the fee should be be $5.00. As stated in his argument Appellant relies upon this alleged oral agreement. Appellee contends that the conversation, which Appellant claims to constitute the oral contract, was in reference to two other mares which Appellant intended to breed to his stallion, and that in any event there was not shown any consideration for such oral contract.

The proof in the case seems to sustain appellee's right to recover. Appellant insists that the verdict should have been for $10.00 or nothing but this is matter of which appellant cannot complain.

The fact that a judgment in favor of appellant was for a smaller amount than the evidence shows he was entitled to recover is not an error of which an appellant can take advantage on an appeal. (Von Horn vs. Stautz 217 Ill. App 601. Erickson vs. Weinberger 194 Ill. App. 444)

One of the instructions given in behalf of Appellee told the jury that if it appeared from a preponderance of the evidence that appellant entered into a written contract with appellee to pay for the season of a colt, and that appellee had performed his part of the contract, Appellee would be entitled to recover whatever sum, if any, the evidence showed to be due him, under the terms of such contract. It is complained by appellant that this instruction ignores

the principle of law that "written contracts may be changed, modified, waived, dissolved or annulled by an oral contract afterwards entered into."

While this instruction was not carefully guarded, yet other instructions given for appellee and those given for appellant fully set forth the effect and binding force of the claimed oral contract, if such contract should be proven, in so plain and clear a manner that the jury could not have been misled on that question.

The judgment of the trial court is affirmed.

Affirmed.

Not to be reported.

Term No. 30. Agenda No. 54.

March Term, A. D. 1923.

J. A. STEELE, Appellee. v. F. R. JOHNSTON, Appellant.	Appeal from Johnson.

Opinion by Higbee, J

This is an action in assumpsit brought by appellee J. A. Steele against appellant F. R. Johnston, to recover damages for appellant's alleged failure to comply with a contract concerning the digging of a certain ditch. The declaration, as amended, alleges that on February 25, 1919, appellee and appellant made and entered into a contract partly oral and partly written whereby appellee agreed to pay appellant the sum of $3000.00 and to dig a ditch commencing at the northeast corner of the southwest quarter of the north east quarter of section 31, in township 13 south, range two east in Johnson county, Illinois, and to run in a southerly direction ten to twelve feet wide and from two to three feet deep across said tract of land, and that appellant in consideration thereof promised to deliver to appellee a good and sufficient deed conveying to appellee the above described lands and to dig a ditch of the same dimensions across his land lying immediately south of and adjoining the above described premises commencing on the north side of appellant's land at the point where the ditch of appellee entered appellant's premises; that appellee complied with his agreement by paying appellant the sum of $3000.00 and digging such ditch, but that appellant complied with only that part of his undertaking which provided for the execution and delivery to appellee of a deed of conveyance and had not dug the ditch as he agreed to whereby appellee suffered damage in the sum of $3000.00. The second count of the declaration was substantially the same as the first except it set out the said written agreement verbatum. To this declaration a plea of general issue was filed. On the trial a verdict was returned in favor of appellee assessing his damages at $625. After overruling a motion for a new trial judgment was rendered by the court for the amount of this verdict.

It appears from the evidence that appellee purchased 40 acres of land from appellant on February 18, 1919, and received from appellant a quit claim deed. This quit claim deed was not satisfactory to appellee and a warranty deed was executed in lieu thereof under date of February 25, 1919. At the time of the consummation of the deal appellee paid appellant $500 in cash and later paid the balance of the consideration of $3000.00. The following written agreement was entered into between the parties: "This contract made and entered into by and between J. A. Steele and F. R. Johnston witnesseth, that J. A. Steele will begin at northeast corner of the 40 acre tract of land just purchased of F. R. Johnston and cut a ditch 10 or 12 feet wide and 2 or 3 feet deep, said ditch to run in a south direction to

F. R. Johnston's land line, and the said F. R. Johnston is to continue same ditch as described above across his premises.

J. A. STEELE

F. R. JOHNSTON."

Witness to contract, W. H. GIBBONS.

It is contended by appellee that the digging of this ditch and the execution of the contract concerning same was a part of the consideration for the purchase of the land. Appellant on the other hand contends that the agreement concerning the ditch was made and entered into after the deal for the land was consummated, and that nothing was said of the ditch until after appellee had made to him the initial payment of $500.00. W. H. Gibbons, a notary public, who witnessed the contract testified that he drafted it and that it was signed in his presence; that at the same time he drafted the agreement he wrote a receipt, which was signed by F. R. Johnston, for the $500.00 paid appellant by appellee; that this money was paid and the ditch contract executed on the same occasion, but that he could not say which was done first. If the digging of the ditch by appellant was not a part of the consideration for the land there does not appear to have been any consideration for the ditch contract. But the testimony of the notary, in our opinion, tends to corroborate appellee upon this question and upon the record as a whole this court cannot say the verdict of the jury in favor of appellee on such question was against the weight of the evidence.

It is urged that the evidence in this case was that the ditch which appellee dug across his land was only 8 or 10 feet wide and 18 inches or 2 feet deep and that this was not a compliance upon his part with the contract which provided for a ditch 10 or 12 feet wide and 2 or 3 feet deep. There was no evidence on the question as to the depth or width of this ditch except the testimony of appellee himself and from it the jury was justified in finding from the evidence that the ditch was 10 feet wide and 2 feet deep, which was at least a minimum compliance with the contract.

The evidence as to the extent of the damages is not very satisfactory. That on the part of appellant tends to prove that appellee's 40 acres, appellant's 40 acres just to the south and a Mrs. Mason's 40 acres just to the south of appellant's 40, are all level land with but very little fall. It also tends to show that in order for the ditch to have an outlet it would have to go across the land owned by Mrs. Mason for at least at a distance of 100 to 125 feet after it left appellant's land. Mrs. Mason, it appeared refused to permit the ditch to be cut across her land. It is contended that this evidence shows that even though the ditch were dug across the lands of both appellee and appellant, it would have no outlet unless continued further, and would be of no benefit to either appellee or appellant and that therefore there was no damage to appellee because of appellant's failure to dig the ditch. On the other hand appellee testified that the land which he purchased was, without the ditch across appellant, worth $1000.00 less than it would be with such ditch. Several witnesses for appellee testified that the land was worth from $800.00 to $1000.00 less without the ditch than with it. Under this proof we cannot say that the verdict is so manifestly against the weight of the evidence that it should not be permitted to stand.

The instructions of appellee told the jury that in case they found for him they could take into consideration as the basis of estimating the damages the difference in the fair mar-

ket value of the land purchased by him from appellant as it was on the day suit was brought and what such value would have been had the ditch spoken of, been dug across appellant's land. Appellant insists that these instructions given for appellee, did not state the true rule applicable to the assessment of damages and that the court erred in giving them. Appellant offered no instructions on this subject and does not suggest in his argument what he considers the true rule of estimating damages in this case should be. The rule adopted by the court in the instructions for appellee appears to us to be a reasonable one, as applied to the facts in this case and there was no error in giving them. Other objections raised by appellant to the same instructions of appellee are of minor importance and do not seem to be well founded.

The judgment in this case will be affirmed.

AFFIRMED.

Not to be reported.

Term No. 31. Agenda No. 42.

March Term, A. D. 1923.

CHARLES FISHER,
Appellant,
vs.
HAZEL FISHER,
Appellee,

Appeal from MADISON.

Opinion by Higbee, J.

This is an appeal from a decree of the circuit court of Madison county, rendered November 22, 1922, awarding to Hazel Fisher, appellee, a divorce from Charles Fisher, appellant, on the ground of extreme and repeated cruelty.

On March 9, 1921, appellant filed his bill praying for a divorce from appellee on the ground of desertion. The bill alleged that appellant and appellee were married October 22, 1915, and lived together as husband and wife until October 28, 1918; that during such time he conducted himself as a true, kind and indulgent husband and provided his wife with the neccessaries and comforts of life according to the best of his means and their station in life; that appellee on the 28th of October, 1918, wilfully deserted and absented herself from appellant without any reasonable cause for the space of two years and upwards; that as the issue of their marriage there was born to the parties one child, Dorothy Alma Fisher on June 22, 1916. The bill prayed for a divorce and for custody of the child. It appears that on May 4, 1921, default was entered against appellee, but the same seems to have been set aside on May 25, 1921; and on the 7th day of June following appellee filed her answer to the bill admitting the marriage, the co-habitation until the 28th day of October, 1918, and also the birth of the daughter. The answer denied that she had deserted appellant and that appellant had conducted himself as a kind and indulgent husband, that appellant was a proper person to have the care and custody of the child and that appellant was entitled to any of the relief prayed for. On the same day appellee filed her cross bill setting forth the marriage and birth of the child, as charged in the original bill. The cross bill further alleged that appellee had while living with appellant faithfully discharged all her duties as his wife and at all times treated him with kindness and forbearance; that appellant about the months of December, 1917, and January, 1918, gave himself up to adulterous and licentious practices and was guilty of adultery with divers persons unknown to appellee and at places unknown to her; that appellant became infected with a venereal disease and at other times committed adultery with persons and at places unknown to appellee and again about the month of October 1918, became infected with a venereal disease; that appellant was guilty of extreme and repeated cruelty toward appellee and neglected to furnish her and her child with proper and necessary food; that on or about December 6, 1917, appellee suffered a miscarriage as the result of appellant compelling her to pack their household goods; that on or about April 24, 1918, appellant kicked and choked appellee and forced her out of their home and on other occasions and dates which appellee was unable to give, threatened to strike appellee, and to

thrust a fork into her body; that he threw a clothes brush at her and used profane and obscene language toward her and her child; that he was a man of violent and ungovernable temper and pursued a course of cruel and inhuman conduct toward appellee so that she was compelled to leave him and cease co-habiting with him.

The cross bill prayed for the custody of the child, alimony and a divorce from appellant. Appellant filed an answer denying the allegations of the cross bill except as to the marriage and birth of the child. On a trial before a jury a verdict was returned finding appellee not guilty of desertion and finding appellant guilty of adultery and extreme and repeated cruelty. On a motion for new trial the court set aside the verdict finding appellant guilty of adultery, but overruling the motion as to the verdict finding him guilty of extreme and repeated cruelty and entered a decree in favor of appellee on the charge of extreme and repeated cruelty as alleged in the cross bill.

Appellee has not filed any brief or argument in this case and under the rules of this court the decree could be reversed and the cause remanded pro forma but upon examination of the record we have deemed it best to consider thecase upon its merits. The only question of moment appears to arise from the charge of extreme and repeated cruelty made by apellee in her cross bill. Upon this question she testified that sometime in April, 1918, appellant in the presence of his father grabbed her by the shoulder and shook her, and that on another occasion the exact date of which does not appear, but which was a considerable time before the separation, he grabbed her by the throat. Appellant denies both of these acts of physical violence and was corroborated by his father who testified that appellant did not shake appellee in his presence. There was no witness corroborating appellee in her testimony of these two acts of physical violence. Appellee further testified that in the latter part of 1916 or early part of 1917, appellant threatened to hit her with a poker and to run a fork through her. Appellant denied this and there was no witness corroborating appellee. Appellee testified that in October, 1916, appellant threatened to strike her in the presence of her brother and in this she was corroborated by her brother. Appellee also testified that appellant used obscene and abusive language toward her and in this she was more or less corroborated by apparently disinterested witnesses. Since the verdict finding appellant guilty of adultery was set aside it is not necessary to consider the evidence on this question nor on the charge that appellant contracted a venereal disease. Both the acts of actual physical violence testified to by appellee and the threats made by appellant all occurred a considerable time before the separation on October 28, 1918. There was no evidence tending to show that the acts of physical violence testified to by appellee were committed in anger nor that appellee was hurt or injured on any occassion; nor was there any evidence from which it appears that as a result of these acts of violence appellee had reason to fear that she was in danger of receiving bodily harm at the hands of appellant if she continued to live with him. In Trenchard v. Trenchard, 245 Ill. 313, the Supreme Court held that these were material facts which should appear, to show that two acts of physical violence amounted to extreme and repeated cruelty. The allegation in the bill that appellee suffered a miscarriage from a result of packing her property was not sustained by any evidence. On the contrary the proof shows that she did not do the packing, even though appellant told her to do so. From the above authorities it does not appear to us that the acts of physical violence testified to by appellee were sufficient to constitute extreme and repeated cruelty even though they were satisfactorily established

by the evidence. In our opinion they are not established by a preponderance of the evidence appearing in the record. "Bad temper, petulance of manner, rude language, want of civil attentions or angry or abusive words are notsufficient grounds for divorce for extreme and repeated cruelty." Trenchard v. Trenchard, supra.

Appellee continued to live and cohabit with appellant for a number of months after the commission of the last act of physical violence testified to by her and she did not file any bill for divorce until over two years after she left appellant and then not until appellant had applied for a divorce from her. In Young v. Young, 130 Ill. 230, the Supreme Court held that the living of a wife with the husband for three months after the last act of physical violence showed a condonation upon her part and was a bar to a bill for divorce on the ground of extreme and repeated cruelty.

We are of the opinion when the whole record is carefully considered that the evidence is not sufficient to sustain the verdict and the decree in this case in favor of appellee. The decree will be reversed and the cause remanded.

Reversed and remanded.

Not to be reported.

Term No. 38. Agenda No. 24.

APPELLATE COURT OF
ILLINOIS,
FOURTH DISTRICT

March Term, A. D. 1923.

John Sandlin, Appellant, vs J. J. Flexter, et al Appellees.	Appeal from Wayne.

OPINION OF HIGBEE J.,

The bill in this case alleges that on the 8th day of November, A. D. 1922, appellees, J. J. Flexter and Jessie J. Flexter being indebted to John Sandlin, appellant, in the sum of $850.58, executed and delivered to him their promissory note of that date whereby they promised to pay to appellant one year after date thereof the sum of $850.58 with interest at the rate of six per cent per annum, and to secure the payment of said note executed and delivered to appellant their mortgage deed of that date upon lot number 26, in the Original town of Jeffersonville, Wayne County, Illinois, and also upon certain enumerated chattels located in a blacksmith shop on said premises; that after the execution and delivery of the note and mortgage to him appellant left said note and mortgage with his other papers with the Geff State Bank for safekeeping; that sometime thereafter the said J. J. Flexter and Jessie J. Flexter went to said bank and without the knowledge or consent of appellant demanded that said note and mortgage be delivered to them stating to the bank officials that the mortgage had not been drawn as it should have been and then and there delivered to the said bank officials a certain other mortgage upon the same property which said last mentioned mortgage recited that it was given to secure the payment of $850.58, but did not state when or where said sum was to be paid or that it was evidenced by a note drawing 6% interest and due in one year; that said last mentioned mortgage contained the following clause "it is hereby agreed by the mortgagee that in case of a sale of the above described property in a foreclosure proceeding that no deficiency decree will be taken"; that thereupon the officials of said bank without the knowledge and consent of appellant delivered to said J. J. Flexter the aforementioned note and mortgage given to secure the same, and accepted in lieu thereof the last mentioned mortgage and filed the same for record in the Recorder's office of the County of Wayne without the knowledge or consent of appellant, and that it was recorded; that appellant did not learn that said note and first mentioned mortgage had been given to said appellees until long after the mortgage had been recorded, and that as soon as he learned thereof he demanded of said J. J. Flexter that he deliver to him the said note and mortgage given to secure the same, but that said J. J. Flexter refused so to do; that said J. J. Flexter

wholly misrepresented the facts to the officials of the bank and falsely and fraudulently represented to them that said note and first mentioned mortgage should be delivered to him and said second mortgage accepted in lieu thereof, and that he made such false and fradulent statements for the purpose of wronging and defrauding appellant of his rights in the premises; that it was not agreed between the appellant and the Flexters that in case of the sale of the property described in said mortgage under a foreclosure proceeding that no deficiency decree would be taken by appellant, and that such statement was wholly false and made for the purpose of defrauding appellant; that after the execution and delivery of said note and mortgage the said J. J. Flexter and Jessie J. Flexter by their quit-claim deed conveyed the said premises to appellee, Ora I. Miller, and that thereafter said Ora I Miller by his quit-claim deed conveyed the same to appellee Joe H. Rich who now claims to be the owner thereof; that at the time of the execution and delivery of said respective deeds to said Miller and Rich they knew that appellant had a mortgage upon the said premises to secure the payment of said note in the sum of $850.58 due in one year, and that they took title with full knowledge of the rights of the appellant under said note and mortgage.

The bill prayed that appellee J. J. Flexter and Jessie J. Flexter be ordered and decreed to execute to appellant a promissory note dated November 8, 1922, due in one year after date for the sum of $850.58 with interest thereon at six per cent per annum, and that the said last executed mortgage be reformed so as to show that it was given to secure the said note and by expunging therefrom the said clause "it is hereby agreed by the mortgagees that in case of a sale of the above described property in a foreclosure proceeding that no deficiency decree shall be taken"; that in default of the execution and delivery of said note within a short date to be fixed by the court appellant have a judgment against the said J. J. Flexter and Jessie J. Flexter for the sum of $850.58 with interest thereon at six per cent per annum from November 8, 1922, to be paid one year after date, and that in default of said payment execution issue therefor, and that appellant have such other and further relief as equity may require, etc.

Appellees J. J. Flexter and Jessie J. Flexter filed a joint and several answer denying they were on the 8th day of November, 1922, indebted to appellant in the sum of $850.58, and that they executed and delivered to him their note of that date for such sum and said mortgage to secure the same.

The answer further denied that appellant left the said note and mortgage at the Geff State Bank for safekeeping, and that said appellees went to the bank without the knowledge and consent of appellant and demanded that the bank deliver to them any note or mortgage whatsoever.

The answer alleged however that said appellees did on said date agree to execute and deliver to appellant a mortgage on said property which was to be so drawn and executed as to cover only the above described property, and that only said property should be subjected to the payment of said $850.58 and that no other liability or obligation should be entered against these appellees for said sum; that appellant accepted and consented to such agreement and accompanied said appellees to the bank and instructed an official of the bank to draw up a mortgage containing said terms and conditions; that said official did draw such mortgage and they executed and delivered the same to appellant and that it was agreed that said mortgage

should be recorded; that the time when and place where the said sum of $850.58 was to paid was unintentionally omitted from said mortgage; that said appellees went to appellant and offered to correct the same accordingly, and that they have at all times been ready and willing to make such correction, but that in other repsects the mortgage which was executed and delivered correctly set forth the terms and conditions of their agreement with appellant. The answer denied that appellant had ever demanded that appellees or either of them deliver to him a note for said amount and a mortgage on the property to secure the same; that said J. J. Flexter in any respects misrepresented the facts to the officials of the bank or that he was in any way guilty of any fraud or wrongdoing in the matter. Appellees Miller and Rich filed separate answers admitting the conveyance to them of the property as set forth in the bill denied that they knew appellant had a mortgage on the premises to secure the payment of a note for $850.58 due in one year, but stated they knew appellant had a mortgage on the premises to secure the payment of $850.58.

After hearing the testimony offered on behalf of appellant the court on motion of appellees dismissed the bill for want of equity. On the trial Appellant testified, in substance, that on November 8, 1922, he held a note against the Flexters in the sum of $810.00 representing the purchase price of the premises in question which he had sold to them about a year previous; that the note was due and he took up the matter with the Flexters to arrange a settlement; that they went to The Geff Sate Bank and had the cashier to compute the amount due on this note which he found to be $850.58; that they both at that time signed a note payable to him for said amount due one year from date and executed their mortgage on the premises to secure the same; that he left the note and mortgage with the bank for safekeeping; that later when he went back to the bank to call for them he was informed that they had been returned to said appellees and a new mortgage taken and recorded. He further testified that he had not authorized the cashier or anyone else to deliver the note and mortgage to said appellees and did not know that it had been done for about ten days after their execution; that he refused to accept the last mortgage which had been taken and recorded; that he went to said J. J. Flexter and demanded that he straighten up the matter which he refused to do; that there was no provision in the original mortgage that the property only was to be availed or for the collection of the debt and that there was no such agreement between him and appellees. On cross examination he testified he did not believe he talked to the cashier before the mortgage was drawn, but that while it was being drawn he did talk to him and told him to have a note made. C. Roy Rudolph, cashier of the bank, who was called as a witness by appellant testified that he remembered the parties coming to the bank to have a mortgage prepared, but that he did not remember that anything was said about a note at that time; that he figured the amount due on the old note to be $850.58 and prepared a new note for that amount which was executed by Mrs. Flexter who signed both her own and her husband's name. That Mr. Flexter at that time was out of the bank; that appellant did not tell him to keep the note and mortgage and that he did not put it with his papers, and that appellant was not in the bank when the note and mortgage were finally signed; that while he was working on the papers someone called Mr. Flexter out, but that he stepped back in and told him not to deliver the papers until he had returned and examined them, and that before he finished drawing the mortgage appellant also left the bank; that when the parties first came they told him that they desired the mortgage to cover only this property, and that it was not to infringe on appellee's home or anything of that sort, and that he advised

them that instead of a mortgage it would be better to draw an agreement to that effect, but that they insisted upon a mortgage; that he executed the second mortgage and inserted the clause in question at the instance of appellee, and that appellant knew nothing of it until it was done; that in his opinion this second mortgage stated in effect the agreement the parties had in the first instance as he understood it from what they then informed him.

There was no other evidence offered by appellant. This bill in effect is a bill for the reformation of the mortgage to the extent of having the clause in question concerning the deficiency judgment stricken therefrom and inserting therein the statement that it was to secure a note for $850.57 due in one year bearing 6% interest per annum. It is also a bill for specific performance to the extent of asking that appellee, J. J. Flexter and Jessie J. Flexter execute and deliver to appellant the note referred to for the sum of $850.58. It is quite evident from the testimony of the cashier that there was no mistake in the drafting of this mortgage which would warrant a reformation thereof. It is clear that he understood in the first instance that the mortgage was not to be a lien on any property of appellee save that described in the mortgage and that was the reason the witness thought it would be better to draw an agreement instead of a mortgage. Three things are necessary to justify the reformation of a written instrument upon the ground of a mistake; (1) the mistake must be one of fact and not of law; (2) the mistake must be proved by convincing and clear evidence and (3) the mistake must be mutual and common to both parties to the instrument. (Silurian Oil Co., vs. Neal 277 Ill. 45). Neither is it sufficient that the evidence of appellant, if true, would tend to show intentional fraud by appellees. (Leuer vs. Kuntz. 274 Ill. 523) The evidence shows that the second mortgage was intentionally prepared by the cashier as directed by said appellees and therefore even if the agreement was as claimed by appellant there was no mistake on appellee's part, but appellee J. J. Flexter would then be guilty of an intentional fraud. However in view of the contradiction of appellant by the witness C. Roy Rudolph this court cannot say that fraud on the part of Flexter was proven.

It is also the rule that to entitle a party to specific performance of a contract the same must be so certain and unambiguous in its terms and in all its parts that the courts can require the specific thing contradicted to be done. If the language employed leaves the intention of the parties in doubt or if it is uncertain as to what was intended a court of equity will not decree specific performance. (Zakrzewski vs Fisher 278 Ill. 557.) Under the evidence in this case we cannot hold that appellant has established to the extent required by the above rule that there was any agreement that such note should be executed.

We therefore conclude that the Chancellor properly dismissed the bill for want of equity and the decree is affirmed.

AFFIRMED.

Not to be reported in full.

Term No. 42. Agenda No. 27

FOURTH DISTRICT

MARCH TERM, A. D. 1923

Mary Dailey, Appellee, vs Grand Lodge Brotherhood of Railroad Trainmen, Appellant.	APPEAL FROM ST. CLAIR

OPINION BY HIGBEE, J.

This is an action of assumpsit brought by Mary Dailey, appellee against the Grand Lodge Brotherhood of Railroad Trainmen, appellant, upon a Class C beneficiary life certificate issued by appellant to Thomas Patrick Dailey husband of appellee who died July 14, 1919. The case was before this court on appeal at the March Term, 1922, on which occasion the judgment of the lower court was reversed and the cause remanded because of error by the lower court in sustaining a demurrer to special pleas setting up misrepresentation of age and accord and satisfaction. Upon a re-trial of the case in the lower court a verdict for appellee in the sum of $1425.50 was returned. For this sum, which is for the full amount of the policy, $1600.00, less $174.50 theretofore paid appellee, judgment was entered. Substantially the only grounds urged for the reversal of the judgment in this case is that the court erred in refusing to admit certain evideence on behalf of appellant. One of the special pleas filed by appellant alleged that the deceased stated in his application for the insurance his age was 44 years and 3 months, whereas in truth his age at that time was 48 years, 8 months and 3 days, and that such mis-statement of his age constituted a fraud on appellant which rendered said certificate null and void and of no effect. To sustain this plea appellant offered in evidence the following paper.

The Old Cathedral Church
St. Louis, Mo.,
Dec. 1, 1919.

To Whom It May Concern:

Dec. 2, 1866, I baptized Thomas, son of Patrick Dalley and Fanny Ives, both from Ireland.

Born Nov. 25, 1866.

Sponsors: John Sweeny and Margaret Daley,

(Signed) Ferrel Girady, CSSR.

I hereby certify the above to be an exact extract from the baptismal records as kept at the Old Cathedral Church, St. Louis, Mo.

P. C. Schultze,
Assistant Pastor.

It also offered the following document under the same plea.

Office of Recorder of Deeds
City of St. Louis, Mo.,
Chas. F. Joy, Recorder.

Application No. 54836 for License to Marry.

State of Missouri, }
City of St. Louis, } ss.

I, Thomas P. Dailey of 417 S. 15th St., and state of Mo., desiring to procure a license to marry Miss Mamie Madden of 26 S. 10th and State of Mo., do hereby solemnly swear that I am of the age of 26 years, that I am single an unmarried and may lawfully contract and be joined in marriage, and I, Miss Mamie Madden, the person above named do solemnly swear that I am of the age of 23 years, and that I am singled and unmarried, and may lawfully contract and be joined in marriage.

(See subjoined statute).

Signature of Male: Thomas P. Dailey.
Signature of Female: Mamie Madden.

Subscribed and sworn to before me this 3rd day of July, 1890.

_____
Recorder.

THEO. HOMAN
MARRIAGE LICENSE CLERK
(Recorder of Deeds, St. Louis)
(Seal)
(State of Missouri)

State of Missouri }
City of St. Louis } ss.

I, the undersigned Recorder of Deeds for said city and state, do hereby certify the foregoing to be a true copy of application No. 54836 for marriage license by Thomas P. Dailey and Miss Mamie Madden, together with the date thereof, as the same remains in my custody.

Witness my hand and official seal this 18th day of December, 1919.

NBC

Chas. F. Joy,
Recorder.

Board of Insurance
Feb. 25, 1921,
B. of R. T.

The court refused to admit either of these certificates, and it is the appellant's contention that they were both admissible under Section 18, of Chapter 51 of the Revised Statues which provides in reference to the manner of proving certain papers, witness records and or-

dinances, that "any such papers, entries, records and ordinances, may be proved by copies examined and sworn to by crediable witnesses." No preliminary proof was made that either of these certificates was the copy of a record required by the law of the state of Missouri to be kept, nor that the original record was in the handwriting of or made by the person required to make the same. Neither was there any preliminary proof that the original record of the Old Cathedral Church was in the handwriting of the priest by whom it purported to be signed. While section 18 of Chapter 51 of our Statute provides that proof of certain records may be made by sworn copies, our Supreme Court has held that the said Section relates only to papers, entries and records mentioned in the previous sections of the act. This is the doctrine laid down in Judson vs. Freutel 266 Ill. 24 where it is also said in reference to this Matter "Chapter 51 is the chapter on evidence and provides by section 13 how court records, papers and entries may be proved. Section 14 provides the manner in which papers, entries, records and ordinances of a city or other municipality may be proved. Section 15 provides how the papers, entries and records of any corporation may be proved, and section 16 refers to the form of the certificate in such cases. Section 17 provides the manner in which proceedings and judgments before justices of the peace may be proved by certified copy."Clearly the record of the Old Cathedral church is not such a record as is intended by said law to be included within any of the papers, entries and records mentioned in the said sections of that act previous to section 18. It is possible that the marriage record of which a copy was offered does come within some of the papers or records mentioned in that act, but such fact should have first been shown by preliminary proof which was not done. In the case of Murphy vs. people 213 Ill. 154 it was sought to prove a marriage ceremony by the introduction of a book containing records of marriages celebrated in a certain church in New York. The Supreme Court while refusing to pass on the question as to whether the church records in any event would have been admissible held, that it was clear from all authorities upon the question that it would not be admissible unless it should be made to appear that the entries were made by the person whose duty it was to make them. If then before an original church record would be admissible it is necessary first to prove that the entries were made by the person whose duty it was to make them, then most certainly before a certified copy of such record could be introduced in evidence it would be necessary to prove that the original record was made by the person whose duty it was to make it. In Sokel vs. People 212 Ill. 238 it was sought to prove the celebration of a marriage by introducing a transcript from the records of marriages reported to the department of health in the City of New York. The Supreme Court held that the admission of such transcript was erroneous because it was not identified and there was no evidence that the record was one required by law to be kept. In the instant case there was no evidence identifying the marriage record of which a copy was sought to be introduced nor was there any evidence to show that the original record was one required by the law of the State of Missouri to be kept. Under these authorities and this condition of the proof the trial court did not err in refusing to permit the certificates to be introduced in evidence.

Appellant also sought to introduce in evidence the proofs of death submitted by appellee to it, in which was a statement that the deceased was over 45 years of age, at the time he made application for the certificate of insurance, but the court refused to admit such proof in evidence. Appellee did not testify in her own behalf, but was placed upon the stand by appellant. When objection was made by appellee to the introduction of these proofs upon the

ground that appellant should not be permitted to impeach its own witness, attorney for appellant stated that the proofs were offered in evidence as a part of the general proof in its case. It had been agreed by attorneys that proper proofs of the death had been made. It was not error therefore to refuse to admit these proofs as a part of the general proof in appellant's case. Neither do we think that it would have been proper to admit them for the purpose of impeaching appellee who had been placed on the stand by appellant. After appellee's claim under this certificate had been refused by one of appellant's head officers, there was sent to the local lodge of appellant $174.50 covering the amount of premiums and dues which had been paid by the deceased. This amount appellee at first refused to accept, but later after she had appealed from the decision of appellant's officer to a higher body of appellant, she did accept the $174.50. This it is claimed by appellant sustained its plea of accord and satisfaction. In the letter which accompanied the draft for this amount appellant's representative asked that appellee be advised that she could appeal from his decision disapproving her claim and the receipt which she signed at the time that she accepted this amount stated that it was in settlement of the above account which purported only to cover dues and assessments, paid by appellee. The question, between these parties was not as to the amount due under this certificate of insurance, but whether or not there was any liability on the part of appellant to appellee. If under the certificate appellee was liable for anything it was liable for the full amount thereof, $1600.00. In our opinion this case comes squarely within the decision of the Appellate Court of the Third District in the case of Morton vs. United Commercial Travelers of America, 202 Ill. App 493 which expressly holds that even if the beneficiary did accept the admitted liability, here the amount $174.50, in full satisfaction of the certificate sued upon, the agreement that it should be in such full satisfaction not having any consideration to support it would be mere *nudum pactum* and would not constitute accord and satisfaction.

Appellant offered the following instruction "The jury are instructed that if the plaintiff made a claim on the benefit certificate issued to her husband, Thomas P. Dailey, and the defendant disputed its liability in good faith, that made it a fair subject of compromise and if the defendant paid the plaintiff the sum of $174.50 for the purpose of settling and adjusting her claim which (and if that) sum was accepted by her for that purpose, then the plaintiff cannot recover and the jury should return a verdict for the defendant! The court modified that instruction by inserting the word in paranthesis "and if that" and striking out the word "which" preceding the parenthesis. The action of the court in modifying this instruction and giving it as modified is urged as error. This action of the court does not constitute error. The instruction as originally drawn might have appeared to the jury as assuming that the sum was accepted by appellee for the pur-pose of settling and adjusting her claim, that was a question to be decided by the jury upon the evidence offered under the special plea of setting up accord and satisfaction.

No reversible error appearing in the record the judgment is affirmed.

Affirmed.

Not to be reported.

Term No. 47 Agenda No. 33

APPELLATE COURT OF ILLINOIS

Fourth District.

March Term A. D. 1923.

Mike Murgic, Appellee, vs Fort Dearborn Casualty Underwriters, Appellant	APPEAL CITY COURT EAST ST. LOUIS.

OPINION BY HIGBEE, J.

This is a suit in assumpsit brought by Mike Murgic, appellee on a policy of automobile insurance issued to him by the Fort Dearborn Casualty Underwriter, appellant. The declaration consisted of one count and charged that appellant on the 25th day of April, 1922, in consideration of $141.50 issued and delivered to appellee a policy of insurance insuring him against loss of or damage to his automobile by collision with any object moving or stationary. That on the 20th day of June, 1922, appellee's automobile collided with a bridge railing on the Collinsville and East St. Louis road and was totally demolished. The declaration then alleges the giving of the required notices and compliance with other provisions of the insurance policy necessary to maintain suit—and claims damages in the sum of $2400.00. Appellant filed a plea of the general issue and four special pleas.

The first special plea alleged that at the time of the accident appellee was operating the automobile in a manner prohibited by law and while under the influence of intoxicating liquor contrary to the provisions of the policy. The second plea alleged that at the time of the accident appellee was operating said automobile in a race or speed contest contrary to the provisions of the policy and sustained damage to his automobile as a direct and approximate result thereof. To the other special pleas demurrers were sustained.

The policy sued on included the following provisions among others. "The underwriters shall not be liable while any automobile hereby coved is used, operated, manipulated or maintained (a) in any race or speed contest, or (b) by any person under the age of 16 years, or (c) any person while under the influence of intoxicating liquor, or (d) while being operated in any manner prohibited by law, or (e) for rental, hire or livery or the transportation of passengers for hire, or (f) beyond the territorial limits of the United States or Canada including however while between points within said limtis." There was a verdict—followed by a judgment for appellee in the sum of $1400.00.

The accident occurred on June 20, A. D. 1922, about 4 o'clock in the afternoon while appellee was driving from Collinsville to East St. Louis. Appellee testified that as he approached the bridge in question there was another automobile in front of him and when he attempted to pass this car it crowded him off the concrete surface of the road, that in trying

to get back on the concrete he stepped on the gas feed or accelerator, instead of the clutch or brake; that at the time he attempted to get back on the concrete he was running about 20 or 25 miles per hour, and that the car struck the railing of the bridge and was totally wrecked. James Wells, a witness in behalf of appellant, who appeared to have no interest in the outcome, testified that he saw appellee on the afternoon in question about one and one half miles east of the bridge; that witness was going from Collinsville to East St. Louis, and when he first saw him appellee was out of his car talking with other men; that about 200 feet before he reached the bridge in question appellee passed the witness and that as he passed him appellee was driving faster than he had ever seen any automobile driven; that in his opinion appellee was traveling 60 or 70 miles an hour; that as appellee attempted to pass a car just in front of the witness the driver of that did not pull to the right, but stayed in the middle of the road so that appellee was compelled to turn off the concrete and that as he went to turn back into the road the front end of the car hit the bridge.

The provision in the policy that appellant should not be liable for any accident occurring to the car while it was being operated in any manner prohibited by law was beyond question a condition precedent to the right of recovery and appellant could not be liable under the policy if the accident occurred while the automobile was being so used. In our opinion the evidence clearly shows that the car was being driven at a rate of speed in excess of 30 miles per hour which would amount to prima facie evidence that it was being operated the use thereof in manner prohibited by law. Appellee testified that he was driving 20 or 25 miles an hour when he attempted to pass the car ahead of him, and that by mistake he stepped on the accelerator or gas feeder, which of course increased his speed. He contends, in effect, that even if the car was traveling at an unlawful rate of speed, such speed was not intentionally caused by him. The rate of speed prohibited by the Statute is specific, the condition named in the policy is positive and definite, and in our opinion it is no defense that the violation of such provision of the policy was caused by an unintentional act on the part of appellee.

In behalf of appellee the court gave the following instruction:

> "The Court instructs you that although you may believe from the evidence that at the time of the collision in question plaintiff's automobile was traveling at a rate of speed in excess of 30 miles an hour, still if you further believe from the evidence that such rate of speed was reduced by the plaintiff unintentionally on his part, then and in the that event plaintiff is not guilty of violating the speed law."

This instruction informs the jury that if the unlawful rate of speed was unintentional on the part of appellee the provision of the policy in question would not be violated. This was not in accordance with our view of the law as above stated and the instruction should not have been given.

The following instruction was also given in behalf of appellee:

> "The Court instructs the jury that if you believe that the plaintiff proved his case by the preponderance of the evidence in manner and form as charged in his declaration, then you should find the issues for the plaintiff and assess his damages in such sums as you believe from the evidence the plaintiff is entitled."

It has been repeatedly held by the Supreme Court as stated in Bernier vs. Illinois Cen-

tral R. R. Co., 296 Ill. 464, that the Court should not give a preemptory instruction to find for the plaintiff if the jury should find that he had proved his case as alleged in the declaration and that it is the duty of the Court to define the issues to the jury without referring them to the pleadings to ascertain what they are. This instruction plainly directs a verdict and it was therefore error to give it.

For the reasons above stated the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

Not to be reported.

Term No. 53. Agenda No. 36

Appellate Court of Illinois

Fourth District

March Term, A. D. 1923.

Louis Kalish, Appellee, vs Continental Auto Insurance Association, Appellant.	APPEAL FROM CITY COURT EAST ST. LOUIS.

Opinion by Higbee, J.

This is a suit in assumpsit brought by Louis Kalish, appellee, against Continental Auto Insurance Association, appellant, in the city court of East St. Louis on an insurance policy to recover damages for the alleged theft of an automobile. The case was tried before the court without a jury and a judgment in the sum of $1000.00 was rendered in favor of appellee. The declaration consists of one count in which it is alleged that the Bankers Auto Insurance Association issued to appellee a certain policy of insurance in consideration of a membership fee and certain premiums paid and to be paid by appellee on a certain Hudson automobile, and thereby promised to pay to appellee the sum of $2225.00 in case the automobile was stolen. The insurance policy is set out in Haec Verba, the substance of which is that the association in consideration of the payment of $17.50 life membership fee and advance premium of $10 and such further premium deposits as may be ordered insured appellee against loss of his automobile by theft from the 8th day of June 1920, and so long as appellee should make payment, when and as requested, of all premium deposits required by the association in accordance with and subject to all the terms, agreements, conditions, and limitations contained in the policy and application. The declaration further alleges that on December 20, 1921, appellant entered into an agreement with the Bankers Auto Insurance Association assuming any and all liability thereafter arising on each policy theretofore issued by the Bankers Auto Insurance Association and that during the month of March, 1922, while the policy of insurance issued to appellee and assumed by appellant was in full force and effect the automobile was stolen; that appellee notified appellant of the loss and demanded payment of the sum of $2225.00 which appellant refused to pay.

Appellant filed a plea of the general issue and a special plea alleging that it is a voluntary unincorporated association composed of its members for the purpose of selling automobile insurance at a minimum cost through the medium of reciprocal contracts conducted on the cooperative plan and not for profit; that it has a representative form of government and makes provisions for the payment of losses sustained by its members while in good standing and that the fund from which payment of said losses is made is derived from assessments collected from its members. This plea then sets forth paragraphs 16 and 21 of the policy and further avers that on January 18, 1922, after the issuance of said policy of insurance "a semi-annual premium of to-wit, twenty-two and 01.100 Dollars ($22.01) became and was due and payable from the plaintiff to the defendant under said policy of insurance and on to-wit the 18th day of January A. D. 1922, a notice was sent by United States mail to the plaintiff at his last address as shown by the records of said association; and a like notice was again sent by the defendant to the plaintiff at the same address by United States mail on to-wit, the 28th day of January, A. D. 1922. But the defendant avers that notwithstanding the said notices so sent as aforesaid and notwithstanding the plain-

tiff's duty under the said contract he never at any time paid the said premium of twenty-two and 01-100 Dollars ($22.01) or any part thereof to the defendant or any one for it. By reason whereof on to-wit the 18th day of February A. D. 1922 the policy of insurance sued on in this case became and was null and void and of no effect." The plea then alleges that the theft of the automobile did not occur until the 26th day of April, 1922, long after said policy was null and void and of no effect.

Paragraph 16 of the policy set out in the above special plea reads as follows:

> "(16) If the assured shall fail to make payment of the membership fee, or any advance premium deposit charged against him, within thirty days of date or notice by mail sent to the last address of assured as shown by the records of association, or otherwise when requested to remit, this policy shall be null and void and of no effect until such payment is made, together with all premium deposits which may be levied during such suspension of this policy and the same has been received and accepted by the attorney in fact before any loss shall have occurred; but in no case will the subscribers at this association be liable for any loss occurring during such suspension, whether payment be subsequently made or not."

Paragraph 21 of the policy as set out in the plea reads as follows:

> "(21) This policy is issued and accepted subject to the statements, agreements, and warranties contained in the application therefor, the subscriber's agreement and power of attorney, all of which are referred to and made a part of this policy as fully as if they were set forth at length herein, and the payment of such premium deposits by the assured as may be ordered by the attorney in fact or advisory board of the subscribers from time to time. Strict compliance on the part of the assured with all of the terms and conditions of this policy shall be a condition precedent to a recovery by the assured hereunder. No waiver or alternation of any of the terms, provisions or parts of this policy by an officer, agent, or employee of the association shall be held to effect a waiver or estoppel against the association, or to change the terms of this policy, unless endorsed hereon by the attorney in fact of the association."

It appears that appellee first had an insurance policy in the appellant company on a Velie car owned by him, but that in 1920 he disposed of the Velie car and acquired the Hudson car in question—, and had a new policy issued covering the Hudson car. The policy covering the Hudson car is the one in question and is numbered 7845-A. In this policy appellee's address is given as 1100 N. 3d Street, East St. Louis, Illinois.

Appellee testified that he obtained this policy in question on June 8, 1920, and that he paid $17.50 membership fee when he acquired the policy and $10.00 as a premium deposit; that on December 8, 1920 which would be just six months after the date of the policy he received a notice of assessment which was paid; that he next received a notice of assessment on June 8, 1921 which he paid; that he receivved a notice of assessment on December 8, 1921 which he also paid. He testified that thislast assessment was for the sum of $22.01 which he paid by giving a check for $12.01 and taking credit for the $10.00 premium deposit made by him at the time the policy was issued. As to the payment of this last premium and the manner in which it was paid he was corroborated by witness, Edward C. Ferguson, who had at one time been an agent of appellant. Appellee further testified that the notices of all these assessments were sent to his brother's address in East St. Louis, and forwarded to him by his brother at Ziegler, Illinois, where appellee lived at the time he took out the insurance on the Velie car, but that he came to East St. Louis to live sometime in December 1921; that he never received notice of any assessment in January or February 1922. His brother also testified he received and forwarded to appellee the notices of assessment in December

1920 and June and December 1921. Warren G. Breeding, a witness introduced in behalf of appellant, who was appellant's collector from October 1920 to September 1922, testified that the first premium under the policy on the Hudson car, which is the policy herein sued on, came due on August 8, 1920 and was paid July 30, 1920; that the second premium became due on February 18, 1921 and was paid on March 9 following; that the next assessment was due on August 18, 1921 and was paid August 28, and that the next assessment fell due November 30, 1921 and was paid December 24, 1921 in the manner testified by appellee, that is, by a check for $12.01 and a credit for his premium deposit of $10.00. This witness further testified that an assessment of $22.01 fell due on this policy on February 18, 1922 and was never paid; that notices were sent to appellee as alleged in the special plea; that on appellant's records there appeared an address of appellee as 11 N. 3rd Street, East St. Louis, Ill., but that the same had been crossed out with a pen; that on the card concerning the policy on the Velie car there appeared an address at Oak Street, Ziegler, Illinois, and also 1008 N. 3rd St., East St. Louis, but that the East St. Louis address on this card had been marked over with a pen and that notices of the assessment due in February 1922 were sent to the Oak Street address in Ziegler and not to the Third street address in East St. Louis; that the original policy on the Velie car was issued on February 18, and that the transfer to the Hudson car was made on June 8; that the dates for the semi-annual premiums would be each six months from the date of the original policy issued on the Velie car, and not from the date when it was transferred to the Hudson car.

From appellee's testimony it would appear that since June 8, 1920 when the insurance was transferred so as to cover the Hudson car he had been paying his semi-annual assessments according to the date of the transfer of that policy. If this is true he was not of course in arrears as to any semi-annual dues at the time the automobile was stolen. On the other hand if the original policy issued on the Velie car was dated February 18, and the date of that policy was followed as fixing the dates when the semi-annual premiums would become due there would have been a semi-annual premium due February 18, 1922. Appellant's witness, Breeding, testified that premiums on the policy covering the Hudson car became due and were paid as follows: Due August 18, 1920, paid July 30 1920; due February 18, 1921, paid March 9, 1921; due August 8, 1921, paid August 28, 1921; due November 30, 1921 and paid December 24, 1921.

Under this witness' testimony that the dates when the semi-annual premiums were due was governed by the date of the policy issued on the Velie car which was February 18, there could not have been any semi-annual premium due November 20, 1921, as appellee had paid the semi-annual premium due August 28, 1921, therefore, the next semi-annual premium would have been due in February 1922. He testified that this premium was $22.01, and it is admitted by all parties that appellee paid a semi-annual assessment of exactly this amount in December 1921. Therefore in our opinion regardless of whether appellant's contention that the dates on which his semi-annual premiums were due were governed by the date of the policy issued on the Hudson car which was June 8, or whether appellee's contention that the dates on which such premiums became due were governed by the date of the policy issued on the Velie car, is right, the evidence shows that a semi-annual premium was paid in December 1921, and therefore appellee could not have been in arrears in a payment of his semi-annual premiums on February 18, 1922

All the parties have treated the premiums, on which it is contended that appellee was in arrears, as a "semi-annual premiums", the special plea, under which this defense is set up, expressly alleges that appellee was in arrears in the payment of a "semi-annual premium", and it seems to have been the practice to collect these premiums at semi-annual dates, whether the evidence on the part of appellant or that on the part of appellee is followed, and the court rightfully found in favor of appellee.

Appellant contends that the court erred in refusing a proposition of law offered by it. The proposition however, does not appear to be based upon the real facts in evidence and had it been given could not have effected the judgment given by the court. There was therefore no error in refusing it.

Appellee, upon the ground that the damages allowed him were too small, has also asked that the judgment in this case be reversed. Appellee, however, does not confess the errors complained of by appellant and has not assigned any cross errors so that he is in opposition to ask a reversal of the judgment. As above held by us the grounds upon which appellant asks for a reversal of this judgment are not, in our opinion, well founded, and therefore the judgment is affirmed.

AFFIRMED.

Not to be reported.

Term No. 55 Agenda No. 21

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

MARCH TERM, A. D. 1923

Margaret O'Connell, Appellee, vs H. J. Eckert Drug Company, Appellant,	APPEAL FROM CITY COURT OF EAST ST. LOUIS

OPINION BY HIGBEE, J.

This is an action of forcible detainer brought by Margaret O'Connell, appellee, against H. J. Eckert Drug Company, appellant. The suit was instituted before a Justice of the Peace and appealed to the City Court of East St. Louis, where at the close of all the evidence, the court after overruling a motion of appellant for a preemptory instruction, gave to the jury an instruction directing it to return a verdict in favor of appellee. Such a verdict having been returned by the jury the court entered judgment in favor of appellee for the restitution of the property in question and against appellant for costs.

On September 30, 1912, Maurice O'Connell was the owner of the Northeast one half of lot two (2) in block number thirty-four (34) of the Platted town, now City of East St. Louis, located at No. 237 Collinsville Ave., in said city. On that date said Maurice O'Connell leased these premises by a written lease for a period of 15 years to J. H. Eckert who afterward assigned the lease to appellant. At the time of the execution of this lease these premises were improved with a brick and frame building. The brick building consisted of a storeroom on the first floor and living quarters occupied by Maurice O'Connell and his family in the second story. The son of Maurice O'Connell had been conducting a drug store in the brick store room. It appears that the sidewalk in front of these premises was above the level of the ground, but that the floor of the room in which the drug store had been conducted and which will be herein referred to as the store room, was on a level with the sidewalk. Beneath this store room was a basement enclosed on all four sides, with brick or stone walls which was used as a foundation for the two story brick building. In the rear of the brick building was a frame building containing two stock rooms attached to the brick portion of the building. This frame building containing the stock rooms was on the same level as the floor of the store room in the brick building. There was no story above the stock rooms, and they were supported below by wooden posts or pillars. At the time of the execution of the lease the space beneath the stock rooms or frame building was probably only partially enclosed by boards, attached to the posts or pillars supporting the same. The lease described the premises as "the premises known as No. 237 Collinsville Ave., in the City of East St. Louis, Illinois, consisting of the first floor store room and four stock rooms in the rear of said store room, and the basement under said store room located on the northeast half of

lot number two (2) in block numbered thirty-four (34) of the platted town, now City of East St. Louis, for and during the term of fifteen years (15) years from the first day of October, A. D. 1912, to the 30th day of September, A. D. 1927." After the execution of the lease appellant became the assignee of the same, took charge of the premises and operated a drug store therein. It appears from the proof that appellant subsequently improved the basement under the brick store room so as to put it in condition for use, and also boarded up the space beneath the frame building, or four stock rooms, put a cinder floor and electric lights therein and used the space for storage purposes in connection with the drug store. Maurice O'Connell continued to live in the second story of the brick building until 1919. He died March 22, 1921. All his heirs deeded their interest in these premises to his widow, Margaret O'Connell plaintiff and appellee in this case. On May 11, 1922, appellee served a written demand upon appellant for possession of that part of the basement located underneath the four stock rooms in the rear of the brick store building, and this suit for possession of that basement followed. Appellee contends that the basement or space beneath the four store rooms under the frame building was not included within the terms of the lease, and that she is therefore entitled to the possession of the same. Appellant contends that it was the intention of the parties to the lease that such space or basement was to be covered by the contract or lease. It is claimed by appellant that the fact he soon after the lease was executed finished boarding in this space, and used it without any objection upon the part of Maurice O'Connell or anyone else until the service demand of possession above mentioned, is proof showing the intention of the parties, and the construction they placed upon the lease, and should have been followed by the court in its construction of that instrument.

While it is true that under some conditions the court should read a contract in the light of the circumstances surrounding the parties at the time it was made, and that the acts of the parties themselves showing the construction they have placed upon the contract may be resorted to by the court for the purpose of determining the true meaning of the written instrument, and while under certain circumstances parol testimony may be resorted to for the purpose of showing the true intention and understanding of the parties to a contract, yet, the facts appearing in this record do not justify the invoking of those rules of construction.

The same rules of law apply to the construction of leases as apply to other contracts (Chicago Auditorium Association vs. The Corporation of Fine Arts Building 244 Ill., 532) but if a clear intention is shown from the face of the instrument such rules of construction do not apply. (Gibbs vs. Peoples National Bank Bldg. 198 Ill. 307) If the language in the contract is plain and unambiguous, proof *aliunde* cannot be heard to contradict or vary its meaning or give it a meaning inconsistent with the language used in the instrument. (Chicago Auditorium Association vs. The Corporation of Fine Arts Building, Supra.)

The language used in this contract of leasing is clear and unambiguous and from the reading of the same it is clear that the lease does not cover the basement beneath the frame building or four store rooms nor any other portion of the premises not specifically named therein.

From the record in this case it appears that the trial court could not properly do otherwise than sustain the motion for a directed verdict in favor of appellee and the judgment based on that verdict will therefore be affirmed.

AFFIRMED.

Not to be reported in full.

Term No. 24 Agenda No. 15

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

MARCH TERM, A. D. 1923

GLADYS L. LEMEN, Ex., Etc., Appellee. vs. JAMES C. DAVIS, Director General, Etc., Appellant.	Appeal from Alton City Court.

Opinion by BARRY, J.

Appellee recovered a verdict and judgment for $8075.00 for the death of her husband, which was the result of a collision between his automobile and a passenger train at a grade crossing in the City of Alton. She charged appellant with negligence in running his train at a greater speed than ten miles per hour in violation of a city ordinance, and in failing to have a flagman at said crossing as required by another ordinance. She averred that her testator was in the exercise of due care and caution for his own safety and that by reason of the negligence aforesaid he was struck and killed and that he left his widow and children surviving. Appellant pleaded the general issue.

The accident occurred at the crossing of Ninth and Piasa streets. Ninth runs east and west and Piasa north and south and they cross at about right angles. The railroad tracks are laid in and upon Piasa street. About 600 or 700 feet north of Ninth street the tracks curve to the northeast around the roundhouse and then curve to the northwest. From a point several hundred feet north of Ninth street the tracks are on a down grade toward Ninth street of one foot to the hundred. Ninth street is on a down grade to Piasa street of six feet to the hundred. At the northwest corner of the intersection and extending west along the north side of Ninth street is a seven foot retaining wall and above that and on the corner is a large building. The north side of Ninth street in the block west of this crossing is closely built up. When a person approaches the said crossing from the west there are substantial obstructions to the view of a train coming from the north. By reason of the obstruction, the lay of the ground and the curves aforesaid it is much more dangerous than the ordinary grade crossing.

Appellee's testator was a physician and surgeon, in the prime of life, and enjoyed a large and lucrative practice. On February 21, 1920, he was driving his car and his fourteen year old daughter was in the front seat with him. He approached the crossing in question from the west and as he reached it he collided with appellant's engine and passenger

train coming from the north and he was killed. He left his widow and three minor children surviving.

A city ordinance limited the speed of the train to ten miles per hour. The train was 20 minutes late leaving Godfrey, which is about four miles north of the crossing in question. Within the limits of the City of Alton and north of the Ninth street crossing the railroad passes under two overhead crossings. The one farther north is about 9000 feet from the place of the accident, and the other about 5600 feet north of the crossing in question, according to the testimony of the city engineer. The engineer in charge of the train testified that he had been running as fast as the train could go, which he said was probably 50 miles per hour, after he had entered the city limits. He said that after he passed the first overhead crossing he applied the air and by the time he reached the second he had reduced the speed to 30 miles per hour. That he released the air and applied it again and again released it when about 1000 feet north of the Ninth street crossing at which time the speed was about 15 miles per hour, and that when he reached the crossing the speed was 20 miles per hour. He said he saw the collision and stopped as soon as he could but the train ran 1258 feet beyond the point of collision. No witness on behalf of appellant put the speed less than 18 or 20 miles per hour as it approached and passed over the crossing.

Appellee's evidence is to the effect that as the train approached and passed over the crossing its speed was 30 to 40 miles per hour. From all of the evidence bearing upon that question we are of the opinion that the jury could very well accept the testimony on behalf of appellee as true. There is no escape from the conclusion that appellant was guilty of negligence in running its train in, upon and across the public streets of the city at such a rate of speed in violation of the city ordinance. Appellant concedes he was guilty of negligence in that regard.

Counsel for appellant says that the principal question of fact involved in the case is whether deceased exercised due care and caution in driving his car as he approached the crossing. He says that the statutory signals were given; that the flagman was standing in the street with his stop sign where deceased could see him; that he failed to heed the warning and attempted to cross the tracks ahead of the train. It is argued that as such is the state of the proof the deceased was not in the exercise of ordinary care and the judgment should be reversed because it is against the weight of the evidence.

The court, at appellant's request, submitted to the jury the following special interrogatories:

1. Does the preponderance or greater weight of the evidence show that the deceased heard or knew of the appoach of the train and tried to cross the tracks ahead of it?

2. Does the preponderance or greater weight of the evidence show that deceased approached the railroad track in question at a rate of speed in excess of ten miles per hour?

The jury should answer each of these questions "No." It is apparent from the questions that appellant considered the facts inquired about as vital to the main issue as to whether

deceased was in the exercise of ordinary care. The jury expressly found that deceased was driving his car at a lawful rate of speed and that he did not attempt to cross the tracks ahead of the train after he heard or knew it was coming.

There is no question but that deceased intended to cross the tracks at the crossing in question and that he was attempting to do so. By the first special finding the jury held that deceased did not hear or know that the train was coming before he attempted to cross. It is, necessarily, a finding that the flagman was not at his post and that he did not warn deceased of the approach of the train, otherwise he would have heard or known that the train was coming.

The record discloses that appellant was satisfied with the special findings of the jury because he made no motion to set them aside and did not, in his motion for a new trial, raise any question as to the sufficiency of the evidence to support them. The question as to whether the said findings are supported by the evidence is not saved for review by a motion for a directed verdict nor by a general objection that the verdict is contrary to the weight of the evidence. Brant vs. C. & A. R. R. Co., 294 Ill. 606; Brimie vs. Belden Mfg. Co., 287 Ill. 11. An objection that the verdict is against the evidence applies only to the general verdict and not to special findings where the latter are not complained of as a ground of the motion for a new trial. Voight vs. Anglo-American Prov. Co., 202 Ill. 462.

In the state of the record as to the special findings we must assume that deceased approached the crossing at a lawful rate of speed and that he did not attempt to cross the tracks ahead of the train after he heard the train or knew that it was coming. We might very well decline to further consider appellant's contention aforesaid but for fear we may be attaching too much importance to the special findings we will discuss the evidence bearing upon the question of contributory negligence.

Five witnesses testified, on behalf of appellee, that there was no flagman at the crossing as the train approached it. One of them was seated at a window in the second story of a house where she could look down on the flagman and his shanty. She says she knew him and that when the train was coming he was sawing wood in the north shed of his shanty, and that as the train came near him he took the stop sign down from where it hung on the side of the shanty but that he did not get out in Ninth street before the collision. Miss Lemen, the daughter of the deceased who was riding with him, says that she was looking ahead as they approached the crossing and there was no flagman out there as her father drove up. Ten or eleven witnesses testified on behalf of appellant, in regard to the position of the flagman. Some of them said he was out in the street with his stop sign before the train reached the crossing and others that they saw him in the street after the train passed over the crossing. The train consisted of an engine and four passenger cars and it may be that the flagman got out in the street after the train had reached the crossing and before it had passed over. The fireman testified that after the train entered the city limits

the station whistle was sounded; that later there were two long and two short blasts of the whistle for the grade crossing north of the roundhouse and that another crossing whistle was sounded near the roundhouse and that the bell was ringing all the time. One of appellant's witnesses was a farmer who was driving a team and surrey on Ninth street in the rear of the deceased. He said he did not know that a train was coming until it came out from behind the wall; that he had a clear view of the crossing but did not see the flagman until the time of the collision.

Mr. Jones, the flagman, admitted that he had been sawing wood but says it was earlier in the day. He says that he was standing by the shanty when deceased turned into Ninth street a block away and watched him as he approached the crossing. He says he did not hear the train until it whistled at the roundhouse about 700 feet north of the crossing, and that he then took down his sign from where it was hanging and went out in the street and held it up. He does not say where the deceased was at that time nor does he undertake to say where the train was with reference to the point of collision, but he does say the train was coming fast and increased its speed.

If the flagman's testimony it true he did not know the train was coming until it was about 700 feet from the crossing although the station whistle and a crossing whistle had been previously sounded. If we accept his testimony as true and the train was going 30 or 40 miles per hour he had but 12 or 15 seconds to take down his stop sign, get out in the street and warn the deceased before the collision. It may be that when he heard the crossing whistle at the roundhouse he thought it was for the grade crossing north of it and was mislead thereby and failed to warn the deceased in time to avoid the collision. On his testimony, alone, the jury might very well conclude that he did not reach his post of duty in time to warn the deceased of the approach of the train before the collision.

Appellant proved by a Mr. Hibbard that after the accident the deceased's daughter said to him that they heard the train but did not see any one out to stop them so they thought they could get across. The conductor testified that he asked Miss Lemen if she could see or hear the train and that she said she saw the train coming, that she saw the flagman and told her father, who said he guessed they could make it. He says that she did not say where she saw the flagman or when she saw the train. Appellant's local surgeon testified that after she was taken to the hospital he didn't know about her having said she saw or heard the train but that she said the flagman signaled them and her father thought he could make it and started to cross the track. She was very seriously injured, greatly excited, and was not yet 14 years old. Her father was dead. She testified she did not remember having made any of the statements aforesaid. That class of evidence was fully answered by the jury's special finding. In view of the whole situation it is not strange that the jury reached the conclusion it did on that question. Even if deceased heard or saw the

train he had a right to presume that appellant would not run his train at a speed prohibited by ordinance. If he saw the flagman and he was not at his post he had a right to presume the tracks were clear.

One of appellant's witnesses testified that he was driving east on Ninth street toward the crossing and was in the rear of appellee's testator and that he did not see or hear the train until it came out from behind the stone wall on the north line of the street. The flagman whose duty it was to watch the crossing and the approach of trains and travelers upon the street did not hear the train until it was about 700 feet from the crossing. The evidence is that after the train came into the city limits it ran for some distance at 50 miles per hour, which was later reduced but was from 30 to 40 miles per hour as it approached and passed over the crossing.

It is a fair inference from the evidence that the deceased did not see or hear the train until it came out from behind the stone wall. There is evidence that just before the collision he turned his car to the south. He was evidently trying to avoid a collision. Under somewhat similar circumstances the supreme court of Iowa held that the question of contributory negligence was for the jury. That court also held that the driver of an automobile is not required to drive at such speed when approaching a railroad crossing, or to have his car under such control as to preclude the possibility of a collision. Dombrenos vs. C. R. I. & P. Ry. Co., 191 N. W. (Iowa) 158.

The question of contributory negligence is one of fact for the jury unless the undisputed evidence is so conclusive that all reasonable minds would reach the same conclusion on the question, Chicago City Ry. Co. vs. Nelson, 215 Ill. 436; Mahlstedt vs. Ideal Lighting Co., 271 Ill. 154-163. A person approaching a railroad crossing in a city or village may presume that the company will not run its trains at a rate of speed prohibited by ordinance, and contributory negligence cannot be imputed to such person for a failure to anticipate that the company would violate the ordinance. Dukeman vs. C. C. C. & St. L. Ry. Co., 237 Ill. 104. By stationing a flagman at a crossing and making it his duty to display proper signals of warning whenever an engine or train is approaching, the public has a right to rely upon the absence of signals of warning and presume that the tracks are clear. C. M. & St. P. R. R. Co. vs. Wilson, 133 Ill. 55.

Whether the attempt of plaintiff's intestate to cross the railroad track at a street intersection while an engine was approaching was negligence depends upon the circumstances shown by the evidence, such as, the apparent distance from her of the approaching engine, the speed at which it seemed to be running, and her right to rely upon the probability that its speed would not exceed that allowed by ordinance. These are all facts, or matters of law and fact combined and the question whether she was guilty of contributory negligence is, therefore, a question for the jury. Baddeley vs. C. C. C. & St. L. Ry. Co., 150 Ill. 328.

Appellee's testator was entitled to presume as a matter of fact, and to act upon such presumption that appellant would obey the law and run his train at the place in question at no

greater rate of speed than the ordinance permitted. C. & A. R. R. Co. vs. Fell, 79 App. 376. In that case on page 379 the court said: "But the rights of both appellant and appellee were common on the highway, an if at that time the engine was being driven at a greater rate of speed than was lawful, who can say that such excess of speed did not cause the injury, and that the care in fact taken by appellee was such that an ordinarily prudent person would have taken under the circumstances to avoid being injured by an engine driven at a lawful rate of speed. From conclusion of this nature, and they are fair deductions from the evidence, we think the jury were at liberty to infer ordinary care on the part of appellee." That case was affirmed in 182 Ill. 523.

Under the evidence in the record there is no escape from the conclusion that if appellant's train had not exceeded the speed limit allowed by the ordinance after it reached the city limits the collision would not have occurred. In view of the foregoing rules of law and all of the evidence bearing upon the question of contributory negligence we are of the opinion that it was a matter peculiarly within the province of the jury. And in view of the conflict in the evidence and the special findings of the jury, which are not properly called in question, we would not be warranted in holding that the verdict is manifestly against the weight of the evidence.

We are of the opinion that the court did not err in giving appellee's first, second and fifth instructions. The objection to her third instruction is fully answered by Gibbons vs. A. E. & C. R. E. Co., 263 Ill. 266-274. The fourth instruction refers the jury to the declaration and for that reason is subject to criticism but the giving of it was not reversible error. McFarlane vs. Chicago City Ry. Co., 288 Ill. 476; Bernier vs. I. C. R. R. Co., 296 Ill. 464-472. The jury was fully and fairly instructed.

Appellant contends that counsel for appellee made improper argument to the jury in regard to the answers they should make to the special interrogatories. The sufficiency of the evidence to support the special findings is not in question as we have shown. That being true, it is not material whether the remarks were improper. Then, too, the objections were sustained by the court. It may be that counsel would have gone too far if objection had not been made and sustained. He then confined his remarks within proper bounds as indicated in C. & A. R. R. Co. vs. Gore, 202 Ill. 188, but an objection was sustained. Appellant has no cause for complaint. Finding no reversible error in the record the judgment is affirmed.

Affirmed.

Not to be reported.

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